In the Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 12

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A MINNESOTA CORPORATION

Appellant

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

MAX SWIREN
135 South LaSalle Street
Chicago 3, Illinois
JAMES E. DORSEY
JOHN G. DORSEY
1300 First National-Soo Line Bldg.
Minneapolis 2, Minnesota
RICHARD MUSENBROCK
111 East Franklin Avenue
Minneapolis 4, Minnesota
Attorneys for Appellant

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

INDEX

AUTHORITIES CITED

Cases:

Statutes:

Miscellaneous:

In the
Supreme Court of the United States

OCTOBER TERM, 1958

No. ———

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, A MINNESOTA CORPORATION

Appellant

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the United States District Court for the District of Minnesota, entered September 16, 1958, dismissing the appellant's complaint and refusing to set aside an order of Division 4 of the Interstate Commerce Commission issued May 31, 1957, and an order of the Interstate Commerce Commission issued October 30, 1957. Those orders, in substance, granted the application of The Atchison, Topeka and Santa Fe Railway

Company, the Pennsylvania Company and The Pennsylvania Railroad Company to purchase the stock of, and acquire control of, the Toledo, Peoria & Western Railroad Company, and dismissed the competing application of this appellant.[1] This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the District of Minnesota, 4th Division, is reported in 165 F. Supp. 893. A copy of that opinion is attached hereto as Appendix A. The report of Division 4 of the Interstate Commerce Commission is reported in 295 I.C.C. 523. Copies of that report and of the orders of Division 4 and of the full Commission are attached hereto as Appendix B.

JURISDICTION

This action was brought under 28 U.S.C. § 1336, to set aside the above-mentioned orders of Division 4 of the Interstate Commerce Commission and of the Interstate Commerce Commission. It was heard by a District Court of three judges, as provided in 28 U.S.C. § 2284 and §§ 2321-2325. The final order of the District Court was entered September 16, 1958, and the Notice of Appeal was filed

---

[1] The interested railroads will be referred to hereinafter as follows:

Toledo, Peoria & Western Railroad Company	Western
The Pennsylvania Railroad Company	Pennsylvania Railroad
The Atchison, Topeka & Santa Fe Railway Company	Santa Fe
Chicago, Burlington & Quincy Railroad Company	Burlington
Wabash Railroad Company	Wabash
The Monon Railroad	Monon
New York, Chicago & St. Louis Railroad Company	Nickel Plate
Chicago, Rock Island & Pacific Railroad Company	Rock Island

in that Court October 2, 1958. The jurisdiction of the Supreme Court to review that decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review that decision on direct appeal in this case: *Chicago, M., St. P. & P. R.R. Co. v. Illinois*, 355 U.S. 300 (1958); *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 151 (1957); *United States v. I.C.C.*, 352 U.S. 158 (1956); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946).

STATUTES INVOLVED

Section 1 of the Sherman Act, as amended (15 U.S.C. § 1), sections 7 and 10 of the Clayton Act, as amended (15 U.S.C. §§ 18 and 20), and the National Transportation Policy and sections 5(2) and 5(11) of the Interstate Commerce Act, as amended (49 U.S.C. preceding § 1, and §§ 5(2) and 5(11)) are set forth in Appendix C hereto.

THE QUESTIONS PRESENTED

1. The orders of the Interstate Commerce Commission should be set aside because of the failure to make findings and the making of improper findings, including the following instances:

(a) The Commission failed to make any findings with respect to appellant's showing of large economies in operation, improved efficiency in service, promotion of the Peoria gateway, strengthening of a small carrier, enhancement of competitive conditions and related material issues.

(b) Substantial evidence is lacking to support the Commission's findings with respect to adequacy of the

appellant's service, the fairness of the proposed purchase price, the effect of a Pennsylvania-Santa Fe acquisition on appellant's revenues, competing freight car availability, and the illusory notion of "independent" operations of Western under Pennsylvania-Santa Fe ownership.

(c) The Commission's findings that Pennsylvania-Santa Fe would solicit Peoria gateway traffic on a parity with their long haul gateways is in direct contradiction to the sworn testimony of the principal officers of both carriers. There are similar conflicts between the Commission's findings and the testimony of the successful applicants respecting industrial development and operating economies.

2. The orders of the Interstate Commerce Commission should be set aside because the Commission failed to give appellant a true comparative hearing, by virtue of the following actions:

(a) The Commission made no determination of the standards required by the National Transportation Policy and the Interstate Commerce Act as applied to these applications, and made no comparative findings of the extent to which the competing applications would comply with or promote each of such standards.

(b) The Commission erroneously adopted, as the determinative standard of public interest and the National Transportation Policy, the continued operation of Western as a "separate" entity. Such erroneous standard (i) ignored the reality of actual control by Pennsylvania-Santa Fe, (ii) was unsupported by any findings of fact as to public advantage of such separate entity, and (iii) precluded consideration of the merits of appellant's

competing application which contemplated merger of service and enormous economies.

(c) In adopting the sole standard of separateness, the Commission ignored the following considerations: the contrasting motives and objectives of the competing applicants, the contrasting economic self-interests of the competing applicants in the Peoria gateway, the advantages to commerce and the national defense of strengthening small carriers and promoting competing gateways, and appellant's proposed improvement in public service by integration of operations and operating economies approximating 35 per cent of the total operating expenditures of Western.

(d) The Commission applied different standards with respect to the results, particularly the diversion of traffic from other carriers, which would follow from the grant of either of the competing applications.

3. Does the authority of the Commission, under section 5(11) of the Interstate Commerce Act, to relieve carriers and their employees of the restraints of the antitrust laws, "insofar as may be necessary to enable them to carry into effect the transaction so approved", carry with it power to condone the violation of section 10 of the Clayton Act occurring prior to the Commission proceedings? If such statutory authority does exist, may it be exercised without any findings with respect to the violation or the considerations motivating the Commission to condonation? Can the statute be avoided by the fact that only one of the Pennsylvania-Santa Fe partnership signed the second contract of purchase, as suggested by the Commission, or by the fact that Pennsylvania Railroad acted through its wholly-owned subsidiary, as suggested by the District Court?

4. Has the Commission authority to sanction a violation by Pennsylvania Railroad and Santa Fe of section 1 of the Sherman Act and section 7 of the Clayton Act without findings of fact respecting the nature and scope of such violations and without disclosing the facts or considerations that warrant relief from the operation of the antitrust laws pursuant to section 5(11) of the Interstate Commerce Act? Was appellant deprived of adequate judicial review and due process by the absence of findings or a statement of the considerations upon which the Commission's sanction of such antitrust violations was predicated?

5. Did the District Court err in holding that "within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly"? Has appellant been deprived of judicial review and due process by the application of that standard without distinction between questions of law, questions of fact, and mixed questions of law and fact, and without regard to the Commission's failure to grant procedural due process to the appellant?

STATEMENT OF THE CASE

1. The Purposes and Motives of the Competing Applicants.

Appellant, whose operating slogan is "The Peoria Gateway", is a small carrier with its main line operating between Minneapolis, Minnesota, and Peoria, Illinois. The latter city is its sole gateway to the east. Western is a short railroad spanning Illinois east and west through Peoria, utilizing the Peoria gateway to avoid the longer haul and congestion through Chicago or St. Louis.

Western has long been regarded as a natural extension of appellant by leading rail experts including the President of Western (Mr. Coulter) and the President of Pennsylvania Railroad (Mr. Symes). The Interstate Commerce Commission denied appellant's application to purchase the stock of Western and instead awarded it jointly to Pennsylvania Railroad, the largest railroad in the east, and Santa Fe, the largest railroad in the west.

More than four years ago appellant began negotiating vigorously for the purchase of Western for the purpose of consolidating operations, effecting economies of almost $2 million per year, and effecting improved and integrated service through the Peoria gateway. The self-interest of appellant is in promoting and maximizing the use of the Peoria gateway upon which its operations are dependent.

Pennsylvania Railroad had previously owned Western in partnership with the Burlington and such ownership resulted in a disastrous receivership of Western. Pennsylvania Railroad had no interest in re-acquiring Western until its President learned that interests close to appellant had acquired the Monon and would be in a position to operate an "outer-outer belt" line around Chicago, whereupon he decided to put an end to that "nonsense" (Tr. 1040).[2] This he proceeded to do by negotiations with Wilmington Trust Company, the corporate cotrustee of the McNear estate, holding 82 per cent of Western's stock. Pennsylvania Railroad invited Santa Fe as its partner. Undisputed evidence establishes that the interlocking directorate between Pennsylvania and Wilmington Trust afforded Pennsylvania decisive preference in the negotiations and the purchase.

---

[2] Since the record has not yet been printed, these references are to the typewritten transcript of the testimony before the Commission. That transcript has been certified to this Court.

The self-interest of the Pennsylvania Railroad and the Santa Fe is in their long hauls through the St. Louis and Chicago gateways and their objective in acquiring Western was to stifle competition through the Peoria gateway, which provides the only outlet to appellant.

2. The Negotiations.

In June, 1954, shortly after new management took control of the appellant, Mr. Heineman, then Chairman of the Executive Committee of the appellant, opened negotiations with Mr. Gladson, the individual cotrustee of the McNear estate, for the purchase of the stock of Western. Negotiations continued during the balance of 1954. By the end of that year the trustees had indicated a desire to sell, the appellant had indicated a desire to purchase, cash as the medium of payment was agreeable to both parties, and the appellant had made a firm offer. On January 25, 1955 Mr. Bancroft of Wilmington Trust Company wrote Mr. Heineman stating that he had learned that there were others interested in acquiring the stock of Western.

At just about that time a representative of Wilmington Trust Company approached Mr. Symes with respect to the possible interest of Pennsylvania Railroad in purchasing Western. Mr. Symes was interested. As indicated above, the reason for his about-face was publicity given to rumors of a connection between the appellant, Western and the Monon to form an outer-outer belt around Chicago. He flatly opposed any such plan (Tr. 309, 310, 1040).

During March representatives of Wilmington Trust Company ignored the appellant's negotiations and the appellant's expressed willingness to pay the highest price, and dealt with the Santa Fe and Pennsylvania Railroad. On

April 15, 1955, Wilmington Trust Company, acting on behalf of both trustees, entered into letter agreements to sell 26 per cent of the stock of Western to Santa Fe and 26 per cent of the stock to the Pennsylvania Company at a price of $100 per share. The appellant received no prior notice of these agreements and no opportunity to bid a higher price despite its earlier offers.

As soon as the appellant learned of these letter agreements, it took vigorous action in its further efforts to purchase the stock on terms more favorable to the sellers. For a substantial period of time the further offers of the appellant were not even communicated by Wilmington Trust Company to the individual cotrustee. On May 5, 1955, the appellant made a formal written offer to buy all the stock at the basis of $133.33 per share. The duration of that offer was subsequently extended to and including May 26, 1955. On the afternoon of May 26th an officer of the Wilmington Trust Company informed Mr. Gurley, then President of the Santa Fe, that the appellant's offer would be accepted unless a higher offer were received by 5 o'clock. The Santa Fe then made an offer to purchase the stock at $135.00 per share, which offer was immediately accepted.

The agreement of May 26, 1955 was between the trustees and the Santa Fe. It was followed by a later agreement among Santa Fe, Pennsylvania Railroad, and the Pennsylvania Company, whereby Santa Fe agreed to sell half the stock to the Pennsylvania Company.

During the period of these negotiations and contracts, four directors of Wilmington Trust Company were also directors of Pennsylvania Railroad and/or its affiliates or subsidiaries.

3. Proceedings before the Interstate Commerce Commission.

On July 8, 1955, Santa Fe, Pennsylvania Railroad and the Pennsylvania Company filed with the Commission a joint application for authority under section 5(2) of the Interstate Commerce Act, as amended, to acquire control of Western through exercise of the several stock purchase contracts. That application became Finance Docket No. 18991. By order of the Commission dated August 2, 1955, appellant was authorized to intervene and to become a party in opposition to that joint application.

On October 13, 1955, appellant filed with the Commission an application for authority under the same statute to acquire control of Western. Appellant did not have a contract, but proposed that, if its application were approved, it would purchase for cash all the outstanding stock of Western at the same price and on the same terms and conditions proposed by Pennsylvania-Santa Fe. Appellant also requested comparative consideration of the two applications. That application became Finance Docket No. 19086. Santa Fe, Pennsylvania Railroad and the Pennsylvania Company were authorized to intervene in opposition to that application. By order dated December 13, 1955, Division 4 assigned the two applications for consolidated hearing.

Numerous parties intervened in the two dockets. They included the Nickel Plate and the Rock Island, each of which requested authority to be included in the acquisition of the stock of Western on an equal basis with the successful applicant or applicants. The Burlington and the Wabash intervened, expressing no objection to the granting of the Pennsylvania-Santa Fe application provided appropriate conditions were attached for the continued maintenance

of the present routes and channels and the continuance of existing traffic and operating relationships and arrangements; they also asked, however, that, if any railroad other than the Santa Fe or the Pennsylvania Railroad were authorized to acquire an interest in the stock of Western, each of them be included in the transaction to the same extent as any such other railroad. Certain other railroad companies, without further participation, requested the inclusion of certain conditions in the event of an order authorizing control. The States of Minnesota and South Dakota, together with their respective utility regulatory bodies, supported the appellant's application and opposed the Pennsylvania-Santa Fe application. The State of Illinois opposed the appellant's application. Certain other bodies intervened in support of the Pennsylvania-Santa Fe application.

A consolidated hearing was held in Peoria in the period February 1-14, 1956, before an examiner of the Commission. The transcript of the testimony comprises 1,933 pages, and there are 136 hearing exhibits.

The proposed Report of the Examiner, served on or about November 9, 1956, recommended (a) dismissal of the appellant's application, (b) approval of the Pennsylvania-Santa Fe application, and (c) denial of the petitions of the other intervening railroads to participate in the acquisition. There followed exceptions, replies and oral argument before Division 4 of the Commission. On May 31, 1957, Division 4 issued its Report and Order (a) approving and authorizing the Pennsylvania-Santa Fe acquisition, (b) dismissing the appellant's application, and (c) denying the request of the Rock Island and the Nickel Plate for inclusion.

Thereafter, appellant filed a petition for reconsideration by the full Commission of the Report and Order of Division 4, and requested oral argument before the full Commission. The Nickel Plate and the States of Minnesota and South Dakota and their regulatory bodies took like action. Other parties filed replies. The Commission did not hear oral argument. Under date of October 30, 1957, it denied all petitions for reargument and reconsideration and made the Order of Division 4 effective thirty days from the date of service of the Order of the full Commission.

4. The Action in the District Court.

On November 29, 1957, the appellant commenced its action against the United States of America and the Interstate Commerce Commission in the United States District Court for the District of Minnesota, seeking to suspend, enjoin, set aside, and annul the orders of the Interstate Commerce Commission. Thereafter a temporary restraining order issued, a 3-judge court was constituted, various parties were permitted to intervene and file pleadings on both sides of the action, and the action was argued and submitted. On September 16, 1958, the Court filed its order dismissing the appellant's complaint. Subsequently the appellant filed its Notice of Appeal and secured an injunction pending appeal. Two later Notices of Appeal have also been filed, one by the State of Minnesota and the Minnesota Railroad and Warehouse Commission on November 10, 1958 and the other by the State of South Dakota and the Public Utilities Commission of the State of South Dakota on November 12, 1958. Those parties have been intervenors throughout the entire administrative and judicial proceedings, representing the public interest of their

respective jurisdictions and supporting the position of the appellant.

THE QUESTIONS ARE SUBSTANTIAL

These proceedings present a sorry picture of administrative procedure at its worst. Two large railroads decided to cut off potential competition by thwarting a joinder of two small railroads—the appellant and Western—despite the logic of that joinder, despite the contributions it would make to the nation's transportation, and despite prior expressions of approval. They accomplished their initial aim of securing a purchase contract when Wilmington Trust Company, having interlocking directorates with Pennsylvania Railroad, obligingly closed its doors to the appellant. Thereafter the Interstate Commerce Commission whitewashed the transaction; in so doing, it ignored the motives and objectives of the competing applicants, it ignored the nation's antitrust policy, it distorted the standards of the Interstate Commerce Act and the National Transportation Policy, and it wholly failed to make proper, requisite findings. Finally, the District Court abdicated its duty of judicial review and gave a startling example of judicial obeisance to administrative "expertise".

The questions presented by this case urgently require full review by the Supreme Court. They are important to carriers regulated under the Interstate Commerce Act, to persons in and out of the regulated industries who are subject to the antitrust laws, and to all persons whose rights are determined by administrative agencies.

1. The Findings.

Proper findings are required by section 8 of the Administrative Procedure Act, 5 U.S.C. § 1007. Section 10 of that

Act (5 U.S.C. § 1009) requires that the reviewing court shall set aside findings unsupported by substantial evidence and that in making that determination the court shall review the whole record. This Court has made it clear that, "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

In the instant case, the appellant adduced substantial and persuasive evidence that its plan conformed to the applicable standards of the Interstate Commerce Act and the National Transportation Policy, and that its plan was entitled to the approval of the Commission in preference to the Pennsylvania-Santa Fe plan. The duty then rested on the Commission to make three classes of findings, viz.: (1) ultimate findings that the appellant's plan was fair and reasonable and consistent with the public interest, and that it better advanced the National Transportation Policy than did the Pennsylvania-Santa Fe plan; (2) basic findings that the appellant's plan would result in substantial transportation economies (which would not be realized in any major degree under the Pennsylvania-Santa Fe plan), that appellant's plan would result in one unified transportation system comprising the present mileage of appellant and Western, thereby, in contrast to the opposing application, developing, coordinating and preserving a valued and essential part of the national transportation system, and serving the needs of our country's commerce and our national defense; and (3) subsidiary and factual findings supporting the basic findings and covering such matters as the dollar amount of annual transportation economies to be anticipated under appellant's plan (approximately $1,800,-

000) as contrasted with the other proposal, the specific advantage of having only one operating yard for the two companies in Peoria, and the specific advantage of having only one management headquarters, as contrasted to the duplication which the Pennsylvania-Santa Fe plan proposed to continue.

Neither in form nor in substance can there be found in the Division 4 report ultimate findings, basic findings and subsidiary and factual findings sufficient to justify the approval of the Pennsylvania-Santa Fe plan and the rejection of appellant's plan. Division 4 did not make the findings indicated in the preceding paragraph. It did not, and on the record it could not, make findings to the contrary.

In *Central of Georgia Railway Company Control*, — I.C.C. — (Finance Docket No. 19159, November 14, 1958), the Commission held that the acquisition of control of a carrier in violation of section 5(4) of the Interstate Commerce Act would not be approved as in the public interest. The dissenting opinion, while agreeing with the recommendation of criminal prosecution, felt nevertheless that, "the public interest would best be served by the operational efficiencies and economies which would result from single control of the Central by the Frisco. The indicated benefits to the public which would flow therefrom outweigh, we believe, the considerations for barring the Frisco from control because of the indicated violations". Since the Commission's most recent pronouncement finds operating economies and improved service to be considerations of such vital import in the public interest, the failure of the Commission in the instant case even to make findings on that subject cannot be justified. This is underscored by the pains that the Commission took to opine that the Santa Fe-Pennsylvania acquisition would yield some operating economies, notwithstanding

the absence of evidence of a single dollar of savings in their proposed "independent" operation of Western.

In the present case the Commission saw in the fact that the acquiring carriers were Western's largest connections, an assurance of the future development of the acquired property. Lurking in the record, however, are certain historical facts which, standing unexplained by either evidence or findings, are inconsistent with that assurance. Western already had a history of ownership by Pennsylvania and Burlington, a large western carrier, both of which had strong interests in competing gateways. The property was permitted to deteriorate and drop into a long receivership from which it was rescued by George McNear, a man of great vision and industry. It was his forceful leadership and aggressive solicitation that built Western into a successful bridge property. The large interchange of traffic with Pennsylvania and Santa Fe, while facilitated by schedule coordination and other cooperation, was nevertheless attributable to the energetic and effective efforts of Western's traffic department. It may well be that the Commission is warranted in expecting the Pennsylvania-Santa Fe acquisition to chart a different course from the long, tragic record preceding the receivership, but the reasons are not revealed. If the number or competition of the gateways or the self-interest of the large carriers or the pattern of traffic has undergone a change in the intervening years, the circumstances and effect of these changes were deserving of consideration or at least mention in the Commission's report.

In at least thirteen instances, the Division 4 report sets forth appellant's position on various necessary facts and issues vital to the determination of the question as to which of the applicants should prevail. In these instances the Com-

mission contented itself with merely a recital of the position appellant presented, by such language as "Minneapolis contends", "Minneapolis estimates", "Minneapolis states", "Minneapolis insists", and the like. Under no possible view can such recitals rise to the dignity of holding, by implication or otherwise, that the Commission either approved or disapproved of these various positions. It was not enough to report that appellant claimed economies aggregating $1,770,945 from the integration of operations with Western, or that it asserted that such economies would inure to the benefit of the shippers and the public through improved service and industrial development. It was incumbent upon the Commission in the application of its expert knowledge to determine and to state in findings whether these economies and public benefits could in fact be achieved. It was not enough to recite appellant's contention that Western is a natural extension of its railroad, or that its interchange with Western at Peoria is proportionately greater in carloads and freight revenues than that of any other carrier appearing in these proceedings, or that Minneapolis proposes to provide new service routes via Western's junctions with connecting carriers for moving traffic in all directions. The absence of findings formulated in the exercise of the Commission's special competence leaves the validity of these assertions and their implications unanswered.

In this case, the District Court's opinion completely ignored the Commission's failure to make findings except in a boilerplate sentence in the penultimate paragraph of the opinion. In so doing, the District Court ignored the requirements of the Administrative Procedure Act and the many cases which have emphasized and re-emphasized the necessity for proper findings by administrative agencies on all important points. *E.g., Chicago, M. St. P. & P. R.*

R. Co. v. Illinois, 355 U.S. 300 (1958); *Carroll Broadcasting Co. v. F.C.C.*, 258 F. 2d 450 (D.C. Cir. 1958); *Boston & Maine R. R. v. United States*, 162 F. Supp. 289 (D. Mass. 1958), appeal dismissed, — U.S. — (November 17, 1958).

In a number of instances where the Commission did make what seemed to be findings, those findings are not supported by substantial evidence upon the record, considered as a whole. Thus, the conclusion that acquisition by Pennsylvania-Santa Fe would not jeopardize a substantial amount of the appellant's present traffic completely lacks support because it ignores not only the appellant's unchallenged accounting studies, but also the successful applicants' own testimony as to solicitation policies. The purchase price was stamped as reasonable by the Commission on the ground that it was negotiated in an arm's length transaction and that appellant was willing to pay as much. Ignored is the fact that appellant's offer was predicated upon economies that would double the income to be derived from the Western property. No consideration was given to the earnings-price ratio that far outstrips the levels established for any railroad on the public exchanges. The Commission's brief in the District Court decries the "speculative test of potential earnings". We had thought it too well settled for argument that "the commercial value of property consists in the expectation of income from it". *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U.S. 217, 226 (1908); *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 526 (1941); *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523, 540 (1943). The Division 4 report fails to explain in terms of value the fact that the contract approved by the Commission calls for a purchase price 35 per cent higher than the one agreed upon by the same "will-

ing buyers" and the same "willing seller", one month earlier. The extent to which considerations unrelated to the public interest—such as the stifling of competition—may have influenced the price enhancement was not considered in the Commission's report.

With respect to these unsupported findings, the Commission and the District Court again ignored the commands of the Administrative Procedure Act and the *Universal Camera* case, and such recent decisions as *Public Service Commission of Utah v. United States*, 356 U.S. —, 2 L. Ed. 2d 886 (1958). For the guidance of administrative agencies and litigants generally, it is imperative that this Court redefine what is required under the substantial evidence rule. See Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (Oct. 1958).

Finally, a number of the findings the Commission did make were patently erroneous because contrary to the evidence and, in some instances, contrary to the sworn testimony of officers of the successful applicants. The Commission found that the successful applicants would permit traffic through, and industrial development of, the Peoria gateway in competition with the St. Louis and Chicago gateways, which would provide them with longer hauls, greater revenues and more effective utilization of their expensive facilities in both cities. The President of Pennsylvania Railroad testified that his line gave preference in solicitation first to St. Louis and then to Chicago, without soliciting for the Effner interchange with Western. He added that this solicitation would not be changed, and that is consistent with the long haul, self-interest of his company (Tr. 280-282). The Santa Fe testimony was that Lomax and Chicago would be put on a parity, but unrouted traffic would be moved through Chicago; and the President of

Santa Fe testified that the influence of the originating carrier was of tremendous importance in routing the traffic (Tr. 98, 210, 259). With respect to industrial development the officers of Pennsylvania-Santa Fe testified that they would seek to locate on Western only such industrial concerns as they could not locate on their own respective properties.

The Commission found that the successful applicants would give improved car supply and other operating benefits to Western. Yet the evidence shows that both Santa Fe and Pennsylvania Railroad have suffered substantial car shortages whereas appellant, as the Commission's report concedes, has an enviable record of car supply. The Commission made findings as to the adequacy and speed of appellant's service west of Peoria and the "neutrality" of connections in appellant's proposal. These findings are in direct contradiction to the only evidence on those subjects in the record.

The District Court apparently felt that these matters were ones peculiarly within the province of the Commission. Be that as it may, an administrative determination based on findings which are flatly and demonstrably erroneous cannot be sustained. As Mr. Justice Brandeis observed in *Baltimore & O. R. R. Co. v. United States*, 264 U.S. 258 at 265 (1924):

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The superficial plausibility of the Division 4 report in this case cannot withstand analysis. The District Court refused to undertake that analysis. Unless the decision of the

District Court is reviewed by this Court, it will stand for the proposition that the legal requirement of proper findings on all essential points supported by substantial evidence on the record, considered as a whole, can be satisfied by recitals, by failures to make findings, by the making of unsupported findings, and by the making of blatantly wrong findings.

2. The Failure to Accord a Comparative Hearing.

The legal requirement that an administrative agency must grant a "comparative hearing" when presented with two mutually exclusive applications had its origin in *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). The specific duty of the agency was summarized as follows in *Johnston Broadcasting Co. v. F.C.C.*, 175 F. 2d 351 at 357 (D.C. Cir. 1949):

> "In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

The same Court has recently announced that when an administrative agency merely gives lip service to the require-

ment but fails to grant a true comparative hearing, the courts should step in to prescribe the correct action. *Midwestern Gas Transmission Co. v. F.P.C.*, 258 F. 2d 660 (D. C. Cir. 1958). This Court has also held that the Interstate Commerce Commission is not relieved from the duty to evaluate conflicting proposals in the light of the statutory standards or from the duty of articulating in findings the steps it has taken to measure the evidence against those standards. *Schaffer Transportation Co. v. United States*, 355 U. S. 83 (1957).

In the instant case the Commission ordered and held a consolidated hearing. But the consolidated hearing did not provide any true comparative consideration of the opposing applications. Some of the respects in which the Commission erred are as follows:

(1). The National Transportation Policy (49 U.S.C., preceding § 1) declares that the Interstate Commerce Act shall be administered so as to "promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation * * * all to the end of developing, coordinating and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense." The criteria of economic and efficient service were ignored in this case. The appellant's application and its supporting evidence clearly demonstrated operational economies, improved efficiency of operation and the strengthening of two small carriers. The successful application proposed no such advantages in accordance with the Congressional mandate. The Division 4 report notes, without comment, appellant's position that it has no incentive other than to maximize service and traffic through

the Peoria gateway, its only outlet to the east. On the other hand, the successful applicants as a matter of self-interest must, and the President of Pennsylvania Railroad stated under oath that he would, favor the longer more lucrative hauls through the Chicago and St. Louis gateways (Tr. 280-282). The Commission saw no occasion to weigh these economic facts or even the motivation of Pennsylvania-Santa Fe in seeking to acquire Western.

To be meaningful a comparative hearing requires specific findings which set out, compare and weigh the advantages and disadvantages of the competing applications to determine the extent to which each accords with the public interest and the statutory standards. Upon a composite consideration of such comparative findings the Commission would be enabled to reach a conclusion, taking into account the public interest balance of the merits of the competing applications.

In this case, however, the Commission never reached this point of comparing and weighing the competing applications. At the outset the Commission decided that the public interest and statutory policy required "separate and independent operation" of Western. The difficulty with that approach is twofold. First, it is illusory to assume independence of a property wholly owned by two of the largest carriers in the country. Secondly, the adoption of that standard automatically ruled out an application which would give effect to the integration and operating economies expressly contemplated by the National Transportation Policy. We might add that nowhere in the report is there a single finding of fact that justifies the Commission's assumption that the illusory independence of Western would in any way serve the public interest or advance the National Transportation Policy. The closest approach is the thought that the largest

connections ought to own the bridge carrier, but what public benefits might be derived from such competition-stifling approach remain unrevealed.

If, as the Commission concluded, the continuation of the present policies of Western is required in the public interest, the only course open would be to deny all applications for acquisition. Certainly the "separate and independent" status of Western, controlled as it would be by Pennsylvania Railroad and Santa Fe, would not continue undiminished Western's aggressive solicitation in competition with the St. Louis, Chicago and Decatur gateways that are more lucrative to its prospective owners. Stripped of empty phrases this is the realistic meaning of the so-called standard adopted by the Commission, and we respectfully suggest that the Court should have the courage to penetrate the veil and strike down the illusion. The truth is, (a) that the appellant is the only carrier in this proceeding which depends exclusively on the Peoria gateway, and (b) that Pennsylvania Railroad and Santa Fe compete directly not only with Western but with every one of Western's connections.

(2) Particularly in an atmosphere of competitive complexities, no true comparative hearing could be afforded without regard for the underlying motivations of the competing parties and the historical background of the property to be acquired. Neither area of inquiry was pursued by the Commission, and both are obviously vital in a determination of the public interest. Pertinent in this regard is the recent instruction to the Federal Communication Commission in *Massachusetts Bay Telecasters v. F.C.C.*, — F. 2d — (D.C. Cir. July 31, 1958), to determine, "Whether the conduct of any applicant, if not of a disqualifying character, has been such as to reflect adversely upon such ap-

plicant from a comparative standpoint". That is particularly pertinent to our case in which the successful applicants combined an attempted purpose to stifle competition with the utilization of interlocking directorates for special advantage in violation of the Clayton Act.

(3) The Commission applied different standards with respect to the loss or diversion of traffic which might be occasioned by one proposal as against the other. On the one hand, it stated that the appellant's application would be "extremely harmful" to other carriers. It instanced only unsupported, vague fears by the Wabash, a subsidiary of the Pennsylvania Railroad. On the other hand, it dealt with the appellant's detailed evidence of the damage it would suffer if Western were owned by Pennsylvania-Santa Fe in the following language:

> "Of course, if service over the Western is improved under the control of the Santa Fe and the Pennsylvania and traffic can be handled over it more economically and efficiently than under existing routes, there may be some diversion of traffic but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers."

The Commission's conclusions on both points are patently erroneous. At the very least, however, minimum standards of fair play would require that the Commission should test the threatened loss of traffic by the same standards in both instances.

(4) As a final example, the Commission imposed certain conditions (for the continuance of existing traffic connections, etc.) as adequate for the protection of others in its approval of the Pennsylvania-Santa Fe application. Those were standard terms. The appellant offered to ac-

cept exactly the same conditions. If they are adequate for the protection of others in the event of acquisition by the two giant railroads, *a fortiori*, they would be adequate to protect the interests of other railroads in the event of an acquisition by this small appellant. The Commission nowhere explained the disparity of its treatment. Before the District Court, counsel for the Nickel Plate, who favored neither side in this controversy, agreed with appellant that the standard terms would be at least as adequate protection in one instance as in the other.

It is readily apparent that the Commission in this case gave no more than lip service to the requirement for a comparative hearing. That this appellant was harmed by that evasion of the Commission's duty is one reason for this appeal. Of broader importance, however, is the consideration that this agency must not be allowed to evade its duty. If it is successful once, it will do the same thing again. If it succeeds, other agencies will do likewise. The end result can only be a further deterioration of administrative justice. This Court alone can guard against that danger by restating the guiding principles with sufficient frequency so that they cannot be overlooked. This case is a sufficient indication that a restatement of those principles is needed and needed now.

3. The Violation of Section 10 of the Clayton Act.

In relevant part, Section 10 of the Clayton Act (15 U.S.C. § 20) provides:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate,

> in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission."

This Court has not heretofore had occasion to construe this statute. Neither the Commission nor the District Court seriously attempted so to do. The purchase of Western, which the Commission was asked to, and did, approve, had its roots in a direct unequivocal violation of this statute. Two legal questions confronted the Commission: The first was whether the authority of the Commission, under section 5(11) of the Interstate Commerce Act, to immunize any steps required to consummate the approved transaction inferentially carried authority to condone *prior* antitrust violations. Neither the language of the statute nor the only prior decision on the subject, *In Re Missouri Pacific R. R.*, 13 F. Supp. 888 (E.D. Mo. 1935), which held that the prohibition of the statute was absolute, was noticed in either the Commission report or the District Court opinion. If it is assumed that the Commission did have such inferential authority, the second question is whether there were any circumstances warranting the exercise of its discretion. No showing on that subject was tendered by the successful applicants and no findings appear in the Division 4 report.

The shallowness of the consideration below is revealed

by the Commission's impression that taking the second contract in the name of Pennsylvania's partner and then dividing the Western shares rendered the statute inoperative, and the District Court's intimation that Pennsylvania Railroad could avoid the statute through the simple device of acting through its wholly-owned subsidiary. Public interest demands that the statute be enforced in the fullest Congressional spirit and that transparent devices stamped with approval below be condemned by this Court.

The Commission's brief in the District Court argued that, "the Commission had no authority to decide whether a violation of Section 10 of the Clayton Act had already occurred." Assuming that the Commission were endowed with discretion to grant the immunity or condonation, the brief does not explain how that discretion could be exercised without noticing the violation and considering its effect upon the public interest. That the Commission has had a recent change of heart in this regard appears in *Central of Georgia Railway Company Control*, — I.C.C. — (November 14, 1958). There the Frisco sought approval of acquisition of control of Central of Georgia. The record revealed that the control had previously been acquired without the necessary statutory authorization. As a matter of sound public policy the Commission declined to exercise its asserted discretion under section 5(11) to permit the law violator to retain the benefits of its outlaw action. After noting that a violation of the Act is not necessarily a bar to approval, the Commission said that the "public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law." The Commission opinion continued:

> "If Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute, i.e., that we pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, the administration of the statute in the public interest would be seriously hindered, if not defeated."

That language applies with equal force and effect to the flagrant violation of section 10 of the Clayton Act, clearly shown by the record in this case and never denied by the successful applicants, the Commission or the District Court. At minimum, if the Commission were in fact authorized by the statute to confer upon the law violator the fruits of its misconduct, its exercise of such extraordinary authority must be supported by something more than a cavalier edict.

An authoritative construction of the statute and definition of the authority of the Commission with respect thereto is of importance to all common carriers engaged in commerce and the persons with whom they must deal.

4. The Violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

The Division 4 report recites the size and scope of operations of the Santa Fe and Pennsylvania systems In the light of those facts, without more, it is readily apparent that the acquisition of Western by Pennsylvania-Santa Fe is a clear violation of section 7 of the Clayton Act and of section 1 of the Sherman Act. By any standard of measure-

ment, the power of these two colossi of the railroad industry is already so great that any further extension of their empire—let alone an extension like the one in the present case, which serves the added purpose of providing an additional bridge to link those two empires with each other—violates the wording, the principle and the spirit of these antitrust laws and the very basic antitrust policy of this country. The orders of the Commission and of Division 4, and the report of Division 4, do not mention either section 1 of the Sherman Act or section 7 of the Clayton Act. That failure raises the question of whether the Commission may authorize an acquisition transaction and immunize its participants from the operation of the antitrust laws where the Commission gave no consideration to the antitrust laws and where, absent such authorization, the transaction admittedly would be in violation of the antitrust laws.

We admit that if the Commission followed the standards enunciated in section 5(2)(b) of the Interstate Commerce Act and in the National Transportation Policy and if, on the facts of a particular case, the Commission explicitly found that deference to those standards outweighed the desirability of preserving or enhancing competition and outweighed the respect to be accorded to the antitrust laws of the United States, then the Commission could proceed under section 5(11) of the Interstate Commerce Act and could use its authorization powers so as to grant immunity from prosecution under the antitrust laws. But the Commission is not empowered to grant such immunity without making appropriate findings giving the basis for such action or, at minimum, without laying bare for the reviewing courts both its conclusion and the reasoning by which it reached such conclusion. In the case at bar, the Commission failed to perform that minimum duty.

The record is barren, not only of findings, but even of evidence to warrant a discretionary exemption from the antitrust laws. Mr. Symes, President of Pennsylvania Railroad, initiated the acquisition for the express purpose of blocking the "grandiose plans" for an outer-outer belt line. He wanted none of "this nonsense", which would move traffic expeditiously around Chicago in effective competition with his Chicago, Decatur and St. Louis gateways (Tr. 309, 310, 1040). While not admitting a purpose of thwarting appellant's expansion and competition, the Santa Fe President explained his joinder with Pennsylvania on the basis that "we prefer to own it" (Tr. 179-180). Wherein these disclosures revealed such social benefit or public interest as to entitle the two railroad giants to freedom from compliance with the antitrust laws, neither the Commission nor the lower court undertook to explain. Why stifling competition and thwarting the expansion of a small carrier, why the illegal use of interlocking directorates warrant the Commission, in the discharge of its duty to protect the public interest, to throw robes of immunity around Pennsylvania-Santa Fe cannot be answered by anything in this record.

The District Court purported to give two answers. First, it relied upon the decision of the Supreme Court in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). In so doing, however, it ignored the command of the *McLean* case that,

> "Congress, however, neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission, in passing on a proposed merger, to ignore their policy." (321 U.S. at 86)

Secondly, the District Court stated that the Commission had given due consideration to the effect of the acquisition

on competing carriers and the possible curtailment of competition. That statement, however, cannot be supported because of the following errors by the Commission, most of which have been mentioned above: (1) the Commission attempted to substitute recitals for the findings required of it, (2) the Commission properly stated the rule as to the burden of proof on Pennsylvania-Santa Fe but failed to apply it, (3) the Commission completely ignored the motives and objectives of the Pennsylvania-Santa Fe, (4) the Commission closed its eyes to the inescapable result of the conflicting interests of the various parties in the Peoria gateway, and (5) the Commission arbitrarily applied different standards with respect to the diversion of traffic which would be occasioned by approval of either of the proposals before it. Thus, the Commission could not and did not give proper consideration to the anti-competitive consequences of its determination.

In the court below, the opposing parties all relied on the *McLean* case to support their arguments concerning the duty of the administrative agency in granting immunization from the antitrust laws. It is apparent that some further clarification by this Court is needed both with respect to the immediate question presented here and also with respect to the broader question of the effect of the antitrust laws on regulated industries currently so much mooted in legal periodicals.

The prevailing uncertainty or chaos in this field is adequately indicated by the following quotations:

> (*Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 270 (1955)):
>
> "In any instance, the weight to be accorded competitive factors in measuring 'public interest' turns, of course, on Congressional intent. At the outset, this

issue is one for agency determination. The agency must make some 'independent conclusion' concerning the Congressionally intended role for competition as well as indicate in any case the effect on 'public interest' of promoting competition.

"Ultimately, however, the agency's interpretation of Congressional design is clearly a proper subject for judicial review. True, the ' "wisdom and experience of * * * [the agency]", not of the courts, must determine whether the proposed consolidation is "consistent with the public interest" '. Equally true, however, it is the Court's 'responsibility to say whether the Commission has been guided by proper consideration in bringing the deposit of its experience * * * to bear * * * in [determining] the public interest.' Where Congress has been silent, the basic policy of our antitrust laws requires the Court's conclusion that competition, at least where all other considerations involved are equal, is in the 'public interest'. In all instances, the courts, in reviewing agency discretion, should recognize that 'administrative authority to grant exemptions from the antitrust laws should be closely confined to those (instances) where the * * * (regulatory) need is clear.' "

(Memorandum submitted December 16, 1957 by the Department of Justice to the Interstate Commerce Commission in *Consolidated Freightways, Inc.—Control*, MC-F-6135):

"In view of the harmful effects an approval herein would have on those interests which are intended to be protected by the underlying policies of the antitrust laws, we respectfully suggest to the Commission that if approval is to be granted, the Commission expressly find that factors, other than competitive, which it is to take into account under the national transportation policy, compel such approval."

(Report of Division 4 of the Interstate Commerce Commission dated February 26, 1958, in *Pacific*

Intermountain Express Co.—Control and Merger-Union Transfer Co., MC-F-6199):

> "In passing upon transactions subject to section 5, it must be borne in mind that applicants have the burden of proving that such transactions will be consistent with the public interest. Among other things, we are required to give consideration to the effect which a proposed transaction will have upon competing carriers and adequate transportation service to the public. In 1950, when Congress amended section 7 of The Clayton Act, it did so to restore its effectiveness in the struggle to maintain competitive conditions in our economy, and an examination of its legislative history discloses a clear intent to assert potential harm to competition as a test of legality under the amended section."

5. The Scope of Review by the District Court.

The opinion of the District Court in this case amounts to an affirmance of the Commission on all points and all grounds. It could hardly have been otherwise in view of the following statement in that opinion:

> "It must be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not limited to deciding them correctly."

Admittedly the scope of judicial review of agency action is a puzzling and difficult field. See, Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955), *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020 (1956), *Judicial Review: Constitutional and Jurisdictional Fact*, 70 Harv. L. Rev. 953 (1957).

In the instant case, however, the District Court completely abdicated its function. It did not consider the lack of

findings, the insubstantial support for many of the findings and the direct contradiction of the Commission's findings by sworn testimony of the successful applicants. In fact, appellant did not have the judicial review commanded by section 10(e) of the Administrative Procedure Act. A reading of the District Court's opinion makes it clear that it accepted in totality the report of the Commission and that it felt unauthorized to inquire into the absence of, the sufficiency of, or the record support for, findings. Undisputed facts contrary to the Commission's conclusions, matters of obvious self-interest, and undisputed evidence were all ignored by the District Court apparently on the theory that to consider them would be to invade the sacred ground of the Commission's expert competence.

This point has a significance far transcending the instant controversy. In their brief in the District Court, the United States and the Commission stated:

> "It is significant to note that although the courts have had frequent occasion to consider orders of the Commission under section 5(2) approving carrier unifications, no case has been found in which such an order has been held invalid on the merits."

We suggest that the Commission is not infallible, and that the lower courts have not performed their proper duty. If this Court will not review the instant decision, it is difficult to know when any Commission decision under section 5(2) of the Interstate Commerce Act will ever be subject to effective judicial review.

CONCLUSION

From an analysis of the entire record, it is apparent that the Commission made up its mind at the outset and then distorted both the facts and the law in an effort to justify its preconceived conclusion. In so doing, the commission erred as a matter of law and far exceeded the limits of the discretion conferred upon it by Congress, however broad and vague those limits may be. It is respectfully submitted that the questions presented by this appeal are substantial, that they are of public importance, and that they require that the appeal be heard on the merits.

Respectfully submitted,

MAX SWIREN
135 South LaSalle Street
Chicago 3, Illinois
JAMES E. DORSEY
JOHN G. DORSEY
1300 First National-Soo Line Bldg
Minneapolis 2, Minnesota
RICHARD MUSENBROCK
111 East Franklin Avenue
Minneapolis 4, Minnesota
Attorneys for Appellant

APPENDIX A

United States District Court
District of Minnesota
Fourth Division

4-57-Civ-123

The Minneapolis & St. Louis Ry. Co.,

Plaintiff,

and

New York, Chicago & St. Louis Railroad Co.,

State of South Dakota, and Public Utilities Commission of the State of South Dakota and

State of Minnesota, and Minnesota Railroad & Warehouse Commission,

Intervening Plaintiffs,

vs.

United States of America,

and

Interstate Commerce Commission,

Defendants,

and

The Atchison, Topeka & Santa Fe Ry. Co., The Pennsylvania Railroad Co. and Pennsylvania Company,

The City of Peoria, the City of East Peoria and the Peoria Assoc. of Commerce,

The State of Illinois,

The shippers along the lines of the Toledo, Peoria & Western Railroad Co., City of Bushnell, Illinois, Bushnell Chamber of Commerce; City of Canton, Illinois; Canton Chamber of Commerce; City of LeHarpe, Illinois; LeHarpe Golden Rule Club; Village of Lomax, Illinois; City of Keokuk, Iowa; Keokuk Chamber of Commerce; Keokuk Bridge Commission; the Hubinger Company, Keokuk; City of Warsaw, Illinois; Warsaw Chamber of Commerce; City of Forrest, Illinois; City of Fairbury, Illinois; City of Gridley, Illinois; City of Gilman, Illinois; City of Sheldon, Illinois; City of Watseka, Illinois; City of Eureka, Illinois; Village of Secor, Illinois; City of Washington, Illinois; City of Chenoa, Illinois,

Intervening Defendants.

Memorandum Decision

Richard Musenbrock and William J. Powell, Minneapolis, Minn., for plaintiff. Dorsey, Owen, Barker, Scott & Barber, Minneapolis, Minn., of counsel.

Philip Stringer, St. Paul, Minn., and Thomas O. Broker, Cleveland, Ohio, for intervening plaintiff New York, Chicago & St. Louis Railroad Company.

Phil Saunders, Attorney General and Herman L. Bode, Assistant Attorney General, Pierre, South Dakota, for intervening plaintiff State of South Dakota, and Public Utilities Commission of the State of South Dakota.

Miles Lord, Attorney General and Harold J. Soderberg, Assistant Attorney General, St. Paul, Minn., for interven-

ing plaintiffs State of Minnesota and Minnesota Railroad & Warehouse Commission.

George E. MacKinnon, U. S. District Attorney, St. Paul, Minn., Victor R. Hansen, Assistant Attorney General, Washington, D. C., James E. Kilday and P. James Underwood, Attorneys, Department of Justice, Washington, D. C. for defendant United States.

Robert W. Ginnane, General Counsel, Washington, D. C., and B. Franklin Taylor, Jr., Assistant General Counsel, Washington, D. C., for defendant Interstate Commerce Commission.

R. S. Outlaw, Starr Thomas, Carl E. Bagge, Chicago, Illinois, for intervening defendant Atchison, Topeka & Santa Fe Railway Company.

Edwin A. Lucas, and Robert H. Bierma, Philadelphia, Pa., for intervening defendants Pennsylvania Railroad Company and Pennsylvania Co. Richards, Jones, Montgomery & Cobb, Minneapolis, Minn. of counsel.

Max J. Lipkin, Peoria, Illinois, for intervening defendant City of Peoria. Fred V. Stiers, East Peoria, Illinois, for intervening defendant City of East Peoria. Verle W. Safford, Peoria, Illinois, for intervening defendant Peoria Association of Commerce.

Latham Castle, Attorney General, Chicago, Illinois for intervening defendant State of Illinois. Harry R. Bagley, Special assistant Attorney General; of counsel.

Robert H. Walker, Keokuk, Iowa, for intervening defendants Communities and Shippers along the lines of the Toledo, Peoria & Western Railroad Company. Boyd, Walker, Huiskamp & Concannon, Keokuk, Iowa, and Cant, Taylor, Haverstock, Beardsley & Gray, Minneapolis, Minn., of counsel.

Before Sanborn, Circuit Judge, and Nordbye and Devitt, District Judges.

Per Curiam.

This is an appeal by the Minneapolis & St. Louis Ry. Co. (Minneapolis) from an order of the Interstate Commerce Commission approving the acquisition of control jointly by the Pennsylvania Company and through the latter, the Pennsylvania Railroad Company (Pennsylvania) and the Atchison, Topeka & Santa Fe Railway Company (Santa Fe) of the Toledo, Peoria & Western Railroad Company (Western) under Section 5(2) of the Interstate Commerce Commission Act (49 U. S. C. A., Sec. 5(2)). Subsequently, the intervening parties were joined.

The report and decision of the Commission's Division 4, dated May 31, 1957, is recorded in 295 I. C. C. 523. The full Commission denied reconsideration and reargument on October 30, 1957. By these orders the Commission granted the application of the Pennsylvania and Santa Fe, subject to the conditions set out in the footnote[1] to

---

[1] "1. That under the control of the Santa Fe and the Pennsylvania the Western shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by us.

"2. The present neutrality of handling traffic inbound and outbound and in overhead service by the Western shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise.

"3. The present traffic and operating relationships existing between the Western, on the one hand, and all lines connecting with its tracks on the other, shall be continued insofar as such matters are within the control of the Santa Fe or the Pennsylvania;

"4. The Western shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

acquire joint control of the Western, dismissed the application of the Minneapolis & St. Louis Railway Company (Minneapolis) to acquire control of Western through stock ownership, and denied the petitions of New York, Chicago & St. Louis Railroad Company (Nickel Plate) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for participation in the stock ownership and control of Western.

Western is approximately 240 miles long. It extends across the northern part of Illinois from Effner on the east through Peoria to Lomax, Illinois, and Keokuk, Iowa, on the west. It connects with the Pennsylvania at Effner, with the Santa Fe at Lomax, with the Rock Island and the Chicago, Burlington & Quincy (Burlington) at Keokuk, with the Minneapolis and Nickel Plate at Peoria. All told, Western has connections for interchange of traffic with 16 railroads. More than two-thirds of its total revenues are derived from overhead or bridge traffic, traffic that is received from one railroad to be delivered to another. Little of its revenue is produced by purely local traffic.

Western has outstanding 90,000 shares of capital stock, 73,800 of which are held by the trustees of the estate of George P. McNear, Guy A. Gladson and Wilmington

---

"5. The Santa Fe and or the Pennsylvania shall not do anything to restrain or curtail the right of industries located on the Western to route traffic over any or all existing routes and gateways;

"6. The Santa Fe and Pennsylvania shall refrain from closing any existing route or channel of trade with any carrier party to this proceeding on account of their control of the Western, unless and until otherwise authorized by us; and

"7. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceedings on our own motion for the same purpose."

Trust Company. McNear had acquired the property in 1927, after the unsuccessful operation of it by Pennsylvania and Burlington had ended in receivership. Under his ownership and operation the road became highly successful and a valuable property. Western occupied a strategic position by passing, as it did, the congested terminals of Chicago and St. Louis. It seems that much of its success came after the construction of a Western Connection with the Santa Fe at Lomax. For the year ended June 30, 1955, approximately 70% of the cars of interchange traffic and of Western gross revenues were attributable to the Pennsylvania and the Santa Fe. The Burlington and the New York Central Railroad Company ranked third and fourth in the volume of interchange, and Rock Island, Nickel Plate, and Minneapolis followed, in that order.

The trustees of the McNear Estate proposed to dispose of the capital stock of Western for $135 a share. Santa Fe agreed to pay that price after Minneapolis had offered $133. Santa Fe allowed Pennsylvania to have half of the stock, subject, of course, to approval by the I. C. C. It is apparent that Santa Fe and Pennsylvania did not favor acquisition of Western by Minneapolis or participation in ownership and control by Nickel Plate and Rock Island.

Minneapolis, supported by the Minnesota and South Dakota plaintiffs, contends, in effect, that, under the evidence and the applicable law, the Commission could not approve the acquisition of the control of Western by the Pennsylvania and the Santa Fe, and should have approved the application of Minneapolis, which would have resulted in a consolidation with increased efficiency and economy in management.

Minneapolis argues that the orders in suit are invalid for the following reasons: (1) Pennsylvania had violated

Section 10 of the Clayton Act, since it and the Wilmington Trust Company, co-trustee of the McNear estate, had directors in common; (2) the acquisition violates Section 1 of the Sherman Act and Section 7 of the Clayton Act; (3) the Commission failed to accord Minneapolis a true comparative hearing; and (4) the findings of the Commission lack adequate evidentiary support.

The Nickel Plate, which, with the Rock Island, had intervened in the proceedings before the Commission, requested equal participation and ownership of Western with whichever carrier or carriers might be authorized to acquire stock control. Rock Island did not intervene herein. Nickel Plate argues that the Commission failed to make findings on material issues relating to the effect that control by Pennsylvania and Santa Fe would have on competitors and on the general competitive situation in the industry, and that if control of Western is awarded to any carrier to the exclusion of Nickel Plate, the neutrality of Western will be destroyed, to its detriment and that of Nickel Plate.

The applications for the control of Western were filed under 49 U. S. C. A. Section 5(2), which, so far as pertinent, provides:

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> "(i) * * * for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock * * *
>
> "(b) * * * If the Commission finds that, subject to such terms and conditions and such modifications as it shall find it be just and reasonable, the pro-

posed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *"

Section 5(11) of Title 49 U. S. C. A. contains this provision:

"* * * any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *"

From these statutes, it would appear that, notwithstanding the antitrust laws and all other legal restraints or obstacles, the Interstate Commerce Commission may, if it determines that it is consistent with the public interest and with the transportation policy of the United States, authorize a carrier or carriers to acquire control of another carrier by purchase of its capital stock. Since Congress has empowered the Commission, and not the courts, to determine whether the acquisition of control of one carrier by another or by others is consistent with the public interest, the determination of the Commission may not be set aside

unless it can be said that there is no rational basis for it. Canadian Pacific Railway Co. v. United States, 158 F. Supp. 248, 251, 252 and cases cited.

That this Court would or might have arrived at a different conclusion, had it had the duty and responsibility of deciding the controversy between the applicants, is of no consequence.[2]

It must be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly. Thompson v. Terminal Shares, Inc., 8 Cir., 89 F. 2d 652, 655; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 8 Cir., 113 F. 2d 698, 701.

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 580-581, 60 S. Ct. 1021, 84 L. Ed. 1368; Pittsburgh Plate Glass v. National Labor Relations Board, supra, 113 F. 2d at 701.

Considering now the contentions of the parties, Minneapolis lays principal stress on the argument that the Pennsylvania and the Wilmington Trust Company, co-trustee of the McNear estate, violated Section 10 of the Clayton Act

---

[2] It will be to no purpose to discuss the contentions of Minneapolis that Pennsylvania was primarily motivated in acquiring an interest in Western by a desire to thwart the plans of Minneapolis. The Commission had no authority to direct the trustees to deal with Minneapolis rather than with the other interested purchasers.

since each of them had directors in common.[3] Its position is that while the exemption provision, Section 5(11), quoted above, may be applicable to Section 7 of the Clayton Act, it is not applicable to Section 10.

However, a reading of Section 5(11) would indicate that the authority vested in the Commission is not only broad, but it is explicitly made "exclusive and plenary." The Commission having found that the acquisition of the Santa Fe and Pennsylvania is in the public interest, it would seem to follow that any antitrust restrictions or prohibitions would become inoperative. In passing, it may be pointed out that here the Wilmington Trust Company is functioning in a fiduciary capacity as Trustee in the interest of the beneficiaries of the trust. We do not have a situation where interlocking directors may be enriched by reason of dealings in their securities and thus should be required to sell securities only to a bidder whose "Bid is most favorable to the common carrier." Section 10 should be quoted. It reads, in part:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its presi-

[3] It should be pointed out that it is the Pennsylvania Company, the wholly-owned subsidiary of Pennsylvania Railroad, which seeks to acquire 50% of Western stock. The Pennsylvania Company is not engaged in railroad operations nor does it operate carrier property. Section 10 refers only to a "common carrier engaged in commerce". While this distinction may not be of controlling importance, it should be mentioned.

dent, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission." 15 U. S. C. A. § 20

A mere reading of this section would indicate that the common directorate which existed between the Wilmington Trust Company and the Pennsylvania Company was not the kind intended by the Congress to be covered by the prohibition. It does not appear to cover the sale of stock held by a trust company to a common carrier. This section apparently was designed to prevent a railroad company from buying securities without receiving competitive bids from prospective sellers. There is no language in Section 10 which pertains to any competitive bidding by the railroad company. In any event, Section 10 is a part of the antitrust laws. See 15 U. S. C. A. § 12. And the immunity granted by Section 5(11) is applicable thereto.

Finally, it should be added that the United States Supreme Court has made it clear that the Interstate Commerce Commission is vested with authority to relieve proposed acquisitions of one railroad by another from the operations of the antitrust laws. For it to do so is consistent with the conditions set out by the Congress in the National Transportation Policy of 1940. In McLean

Trucking Co. v. United States, 321 U. S. 67, 64 S. Ct. 370, 88 L. Ed. 544, the Court said at pp. 84-85:

> "* * * there can be little doubt that the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the motor carrier industry. And in authorizing those consolidations it did not impart the general policies of the anti-trust laws as a measure of their permissibility."

And on p. 87:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coördination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'con-

> sistent with the public interest.' (Citing cases). If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

While this language was used with reference to consolidation in the motor truck industry, it is applicable here.

However, Minneapolis stresses the alleged stifling competition by the so-called oligopolistic control by two major railroads of a strategic bridge line whose independence heretofore assured Minneapolis access to its most important gateway. It reasons that the mere recital in the findings of the Commission as to the extensive mileage, large revenues, and manifest prosperity of these two great railroad systems, compels the conclusion that the acquisition of Western would violate Section 1 of the Sherman Act and Section 7 of the Clayton Act. Minneapolis contends, therefore, that the Commission must weigh the violation of the anti-trust laws against all other relevant factors and base its conclusion on adequate findings.

At the outset, it may be observed that, merely because these two large railroad systems have acquired a 240-mile railroad under joint control, does not in and of itself justify a finding that there will be an oligopolistic control which stifles competition. It is not the function of the Commission to determine whether the acquisition of Western by these two railroads will violate the anti-trust laws. The Commission has not attempted to do so and can make no definitive decision as to whether or not the contemplated transaction will result in a restraint of trade or a monopoly which is forbidden by law. McLean Trucking Company v. United States, supra, 321 U. S. at 79.

Suffice it to say that the Commission did give due consideration to the effect of the acquisition on competing carriers and the possible curtailment of competition, and weighed such factors as against the broad question of public interest. We recognize that the Commission's expertise is not infallible, but where there is no question as to the Commission's having given consideration to the effect of curtailing competition in the light of the National Transportation Act, and where its conclusions are not without substantial foundation, we cannot substitute our judgment for that of this administrative agency. Whether dire competitive consequences will occur, as predicted by Minneapolis and Nickel Plate by reason of the acquisition approved by the Commission, is a matter to which its attention was directed. It concluded that any adverse competitive results were far outweighed by the safe, adequate and efficient services which would inure to the public as a result of such acquisition.

Minneapolis next urges that its application was not given a true comparative consideration by the Commission. The Commission pointed out that the proceedings before it concerned two applications for control. The two applications were consolidated and submitted on a single record and disposed of in one decision. Apparently the lack of contract by Minneapolis with the trustees did not deprive it of a full and complete hearing before the Commission. As noted above, the Commission considered the advantages and disadvantages of integration of Western with Minneapolis, and with respect thereto it considered and weighed the reasons why the Santa Fe and Pennsylvania proposal was more consistent with public interest. We cannot say that the Commission acted arbitrarily, or that it did not evaluate the two competing proposals in light of

the public interest. The advantages to Minneapolis in adding Western to its railway system seems apparent. No doubt Minneapolis would be materially strengthened by its proposed integration with Western. But obviously the advantages to Minneapolis was only one of the considerations and factors which the Commission had to weigh and evaluate.

The plan which Minneapolis proposes is to abolish Western as an independent carrier, and that plan is strongly opposed, not only by the carriers and other defendants who have intervened herein, but also by many communities and industries in Illinois and Iowa, as well as the employees of Western. The removal of the offices of Western and its key personnel to Minneapolis is strongly protested. The large savings which allegedly were to follow upon an integration of Minneapolis and Western, as asserted by Minneapolis, was weighed and considered by the Commission. Likewise, the alleged economic harm which would ensue to other carriers under Minneapolis' plan to establish coordinated schedules between it and the many other lines which intersect with Western was considered by the Commission. Whether upon integration there would be such a diversion of traffic to Minneapolis which would be harmful to other carriers is a matter that the Court should not attempt to determine. Such questions are peculiarly for the Commission to decide, and we cannot say that the evidence as to such harm is not substantial. It may be noted that, of the $1,770,945 reduction in combined operating expense of Minneapolis and Western if integration took place, $1,327,062 would result from the elimination of some 256 positions now occupied by employees of Western. Whether such economies outweigh the alleged detriment to Western's employees, to its local in-

dustries and communities, and to other carriers, is also a matter which is clearly within the sound judgment of the Commission.

Nickel Plate's principal contention is that the Commission failed to make adequate findings on the general competitive situation, primarily with reference to the eastern territory of the United States. Nickel Plate states that the Commission's failure to analyze the effect on competition when railroads the size of Pennsylvania and Santa Fe take over Western and fail to make specific findings in that regard, is fatal to the validity of its order. However, the Commission was fully cognizant of the competitive situation in the light of the proposed acquisition, but it concluded that the other carriers' interchanging traffic with Western would not be injured. It specifically emphasized the protection which would be afforded carriers exchanging traffic with Western in view of the checks and balances ingrained in a system where the ownership is divided equally between the largest connecting carrier in the East and the largest in the West. If the Commission is sound in its prediction that the connecting and immediate competing carriers of Western will not be injured by the acquisition and that competition generally will not be unduly curtailed, it would not seem necessary for the Commission to discuss the question of any alleged monopolistic threat to the eastern railroads or as to the nation as a whole. None of the so-called eastern railroads have intervened here. Moreover, it may be pointed out that Western is not the only strategic bridge line from the Middlewest to the eastern carriers. There are other carriers that bisect the same east and west area and are in direct competition with Western. Such factors were undoubtedly given due consideration by the Commission. We cannot say that the

Commission's conclusion that the patent self-interest of these two large railroads, with the restrictions imposed upon them in the ownership of Western's operations and an independent railroad tends to insure an operation which will be consistent with the public interest, is erroneous.

The Commission specifically found that "Public interest demands that the present policies of Western in all respects be continued." It concluded that this result would be attained if the two carriers which had contributed the greatest volume of traffic with Western, one from the East and one from the West, should be accorded joint ownership. As stated, it appears that some 70% of Western's interline traffic is exchanged with these two railroads. This constitutes about two-thirds of Western's total traffic. Nickle Plate has not substantiated its position that the Commission acted arbitrarily in denying it the right to participate in the ownership of Western's stock. The Commission concluded that "Any reduction in the ownership interest of the Santa Fe and the Pennsylvania by the inclusion of other carriers in the control of Western would be accompanied by an equivalent reduction in their economic incentive for future development of Western and the territory served by it." That this deduction is a sound appraisal of the situation cannot be characterized as unsupported by the evidence. It is entirely reasonable to expect that the two carriers which are largely responsible for the excellent condition of Western today, will, by sheer self-interest, continue with the same incentive in the future.

The Commission might have granted the application of Minneapolis for sole control and ownership, which was strenuously opposed by all those carriers who wanted Western to remain independent and neutral. The Commission might have authorized the Rock Island and the Nickel

Plate to join the Pennsylvania and the Santa Fe in joint ownership and control of Western. The Commission concluded that the application of Pennsylvania and Santa Fe was consistent with the public interest and should be granted. That, we think, under the evidence and the law, it had power to do; and, even if that conclusion was wrong, it cannot be said to be arbitrary or capricious, and is therefore binding upon this Court.

We have fully considered all of the other arguments and contentions of the parties and conclude that they are, likewise, without merit. The Commission's Order is based on adequate findings supported by substantial evidence in the record before it.

The petitions are dismissed and the temporary restraining order is discharged. A stay of 30 days is granted.

Dated September 16, 1958.

John B. Sanborn,
United States Circuit Judge.
Gunnar H. Nordbye,
United States District Judge.
Edward J. Devitt,
United States District Judge.

APPENDIX B

Interstate Commerce Commission
Finance Docket No. 18991 [1]

Toledo, Peoria & Western Railroad Company Control

Decided May 31, 1957

---

1. Acquisition by the Atchison, Topeka & Santa Fe Railway Company and the Pennsylvania Company, and through the latter by the Pennsylvania Railroad Company, of control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock, approved and authorized. Conditions prescribed.

2. Request of the Chicago, Rock Island & Pacific Railroad Company and the New York, Chicago & St. Louis Railroad Company, under section 5(2)(d) of the Interstate Commerce Act, for authority to be included on an equal basis in the acquisition of control, through stock ownership, of the Toledo, Peoria & Western Railroad Company, denied.

3. Application of the Minneapolis & St. Louis Railway Company for authority to acquire control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock dismissed.

J. C. Gibson, R. S. Outlaw, Starr Thomas, Carl Bagge, J. B. Reeves, Edwin A. Lucas, John B. Prizer, Robert H. Bierma, and *Thomas O. Hunter,* for applicants in Finance Docket No. 18991.

---

[1] This report also embraces Finance Docket No. 19086, Toledo, Peoria & Western Railroad Company Control.

Burton K. Wheeler, Edward K. Wheeler, Richard Musenbrock, Eldon S. Olson, and *Robert G. Seaks* for applicant in Finance Docket No. 19086.

Latham Castle and *Harry R. Begley* for the State of Illinois.

Phil Saunders, Herman L. Bode, Charles A. Carr, and *C. A. Merkle* for the State of South Dakota and the South Dakota Public Utilities Commission.

Miles Lord, Harold J. Soderberg, Oliver A. Ossanna, and *Paul A. Rasmussen* for the State of Minnesota and the Minnesota Railroad & Warehouse Commission.

Bryce L. Hamilton, Howard P. Robinson, and *Martin M. Lucente* for various NcNear interests.

Bruce Dwinell, Eaton Adams, M. L. Cassell, Thomas O. Broker, Eugene S. Davis, Eldon Martin, Harold E. Spencer, Erle J. Zoll, Jr., Edgar Vanneman, Jr., Albert S. Long, Jr., Merrill Shephard, John B. Goodrich, and *John W. Adams* for railroad interveners.

Verle W. Safford, Max J. Lipkin, Fred V. Stiers, Milo Fleming, Don B. Pioletti, Lynn C. Sieberns, Fred Raney Miller, Lyman R. Fort, Leon L. Lamet, Blaine Ramsey: Lawrence B. McNunn, C. V. O'Hern, Jr., Paul C. Cation, John L. Bordes, and *Robert H. Walker* for other interveners.

Clarence M. Mulholland, Richard R. Lyman, and *H. O. Thompson*; for railway labor organizations.

Report of the Commission

Division 4, Commissioners Mitchell, Arpaia, and Winchell

By Division 4:

Exceptions and replies to exceptions were filed to the report proposed by the examiner, and the cases have been argued orally. Exceptions and requested findings not specifically discussed herein or reflected in our findings or conclusions, have been given consideration and found not justified.

The Atchison, Topeka and Santa Fe Railway Company (Santa Fe)[2], the Pennsylvania Company, and The Pennsylvania Railroad Company (Pennsylvania), on July 8, 1955, in Finance Docket No. 18991, applied under section 5(2) of the Interstate Commerce Act, as amended, for authority (1) to the Santa Fe and the Pennsylvania Company to acquire direct control of the Toledo, Peoria & Western Railroad Company (Western), through ownership by each of 50 per cent of the capital stock of the latter; and (2) to Pennsylvania, by virtue of its 100 per cent stock ownership of the Pennsylvania Company, to acquire indirect control of Western.

On October 13, 1955, in Finance Docket No. 19086, The Minneapolis & St. Louis Railway Company (Minneapolis) applied for authority under the same section of the act to acquire control of Western through ownership of its entire capital stock.

A consolidated hearing on both applications was held February 1 to 14, 1956, inclusive, at Peoria, Ill. Prior to, or at the hearing, numerous petitions for leave to inter-

[2] Hereinafter in this report, as throughout the record, the various railroads involved sometimes will be referred to by the abbreviated designations shown in parentheses.

vene were granted. Applicants in Finance Docket No. 18991 intervened in opposition to the Minneapolis application in Finance Docket No. 19086, and the Minneapolis intervened in opposition to the authority sought in Finance Docket No. 18991. Unless otherwise indicated, all points hereinafter mentioned are in the State of Illinois.

Position of intervening railroads—The New York, Chicago and St. Louis Railroad Company (Nickel Plate) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island) each requests authority under section 5(2)(d) of the act to be included in the acquisition of the stock of Western on an equal basis with the successful applicant or applicants. The Chicago, Burlington & Quincy Railroad Company (Burlington), and the Wabash Railroad Company (Wabash), have no objection to the granting of the application of Santa Fe and Pennsylvania, provided appropriate conditions are contained in the order for the continued maintenance of present routes and channels of trade via existing junctions and gateways, and the continuance of all existing traffic and operating relationships and arrangements. In the event any railroad other than the Santa Fe and the Pennsylvania is authorized to acquire an interest in the stock of Western, the Burlington and Wabash ask to be included in the transaction to the same extent as any such other railroad.

The Illinois Central Railroad Company (Illinois Central) the Gulf, Mobile and Ohio Railroad Company (Gulf), and the Chicago and North Western Railway Company (North Western) request that, if either application is granted, appropriate conditions be imposed with respect to the maintenance of all routes and channels of trade via existing gateways.

The Monon Railroad requests that, in the event the application of the Santa Fe and the Pennsylvania is approved, one of the conditions to be attached to such approval includes a requirement that the Pennsylvania negotiate and enter into a contract giving the Monon trackage rights over the Pennsylvania lines between Effner and Reynolds, Ind., approximately 35 miles, upon reasonable terms and conditions, subject to our approval. If such a condition is not included, Monon requests that the application of the Santa Fe and the Pennsylvania be denied.

Other interveners—Various communities, civic organizations and shippers, many of whom are located along the line of Western, intervened in support of the Santa Fe-Pennsylvania application; and the Railway Labor Executive's Association and the Brotherhood of Railroad Trainmen intervened to protect the interests of carrier employees. The States of Minnesota and South Dakota, with their respective Public Utilities Commissions, supported, and the State of Illinois opposed, the application filed on behalf of the Minneapolis.

History, policies, and description of Western—The main line of Western extends from its eastern terminus at Effner on the Illinois-Indiana State line, via Peoria, to the western termini at Keokuk, Iowa, and Lomax, approximately 234 miles. A branch line extends from Hamilton to Warsaw, approximately 5 miles. It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner, with the Santa Fe at Lomax, and with several carriers at Peoria, a point almost midway between Chicago and St. Louis, Mo. Other points of interchange are maintained at Keokuk, and at Sheldon, Webster, Watseka, Gilman, Forrest, Fairbury, Honegger,

Chenoa, El Paso, Eureka, Washington, Farmdale, Canton, Cuba, Bushnell, Ferris, Elvaston, and Hamilton. The headquarters, shops, and yards of Western are at East Peoria, just across the Illinois River from Peoria.

Western began its modern existence in 1927, when George P. McNear acquired the property after a prolonged ownership by the Pennsylvania and the Burlington, which ended in receivership. *T. P. & W. R. R. Acquisition*, 124 I. C. C. 181. Under the guidance of McNear, Western was built into a fine railroad, and upon his death, in 1947, the present management took over and continued with much success. The policy of Western has been, and now is, to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight. Such policy emphasizes the strategic position of an overhead carrier through Peoria as an alternative route, bypassing the congested terminals of Chicago and St. Louis. Much of the success of Western as a bridge line dates from the construction of a western connection with the Santa Fe at Lomax in 1927, authorized in *T. P. & W. R. R. Construction*, 124 I. C. C. 278. In 1928, the first full year after completion of the Santa Fe-Western Lomax connection, the Western interchanged a total of 29,697 carloads of traffic with the Pennsylvania and 7,264 carloads with the Santa Fe. By 1955, the corresponding figures increased to 58,543 carloads, or 97 per cent, and 34,755 carloads, or 378 per cent, respectively.

Over the years, the Santa Fe and the Pennsylvania have cooperated with Western in coordinating their schedules and services. In 1930, arrangements were made for the establishment of coordinate schedules for the handling of perishables from Santa Fe origin territory, and the Western constructed icing facilities at Peoria to accommodate such traf-

fic. Today, the Santa Fe, Western, and Pennsylvania schedules are set up to provide a fully competitive service over the Western route. On westbound traffic moving between Effner and Kansas City, Mo., the Western-Santa Fe service west of Peoria would be a full day faster than if the traffic were handled by the Minneapolis from Peoria to Nemo, thence by the Santa Fe to Kansas City. Eastbound it would be from 11 to 14 hours faster.

Western traffic and revenues—At present, more than two-thirds of the total revenues of Western are derived from overhead or bridge traffic. Much of the remainder is produced by the handling of interline traffic which originates or terminates along its line. Less than 9 per cent of its revenues is produced from local traffic.

For the year ended June 30, 1955, the latest period for which both car and revenue data were available, the total freight revenue of Western was $6,920,432. Of a total of 105,705 cars of interline traffic handled during the period, 74,772, or 70.7 per cent, were interchanged with the Santa Fe and/or Pennsylvania. Such interchange accounted for $4,404,318 or 69.8 per cent, of Western's gross revenues for that year. The Burlington and the New York Central Railroad Company ranked third and fourth in the volume of interchange with Western, and the Rock Island, Nickel Plate and Minneapolis ranked fifth, sixth and seventh, respectively. The protection of interchange traffic was one of the principal reasons advanced by the applicants, and recognized by us in approving acquisition of control in *Detroit, T. & I. R. Co., Control*, 275 I. C. C. 455.

Capitalization—Western has outstanding 90,000 shares of capital stock of which 73,800 shares, or 82 per cent, are held by the trustees of the McNear estate hereinafter re-

ferred to as the trustees. The remainder is held by the Hanover Bank, by other members of the McNear family, and by the president of Western. The Santa Fe has entered into agreements for the purchase of all the capital stock of Western at a price of $135 a share. Each agreement provides for consummation of the purchase of the stock within a reasonable time after our approval. The purchase price is to be paid upon delivery of the stock at the time of settlement, in cash or by certified cashier's or treasurer's check, and the stock is to be delivered to Santa Fe free and clear of all liens, encumbrances, trusts, or obligations of any kind or nature.

Valuation data—The value of the Western's property for rate-making purposes as reported by division 1 as of June 30, 1917, was $7,121,384. Additions and betterments less retirement from the date of valuation to December 31, 1954, as reported by the carrier, amounted to $5,708,109 for carrier-owned property and $749,974 for noncarrier-owned property.

Negotiations leading to sale of stock—The trustees determined to sell the controlling interest in Western in order to diversify the holdings of the trust estate. In June, 1954, the Minneapolis made the original offer to purchase the shares held by the trustees at a price of approximately $69.50 per share. Subsequently, the purchase price per share was increased to about $80. In the spring of 1955, the Santa Fe and the Pennsylvania actively became interested, and on April 15, 1955, actually obtained commitments from the trustees for 26 per cent of the Western stock, each at a purchase price of $100 per share.[3] A dis-

[3] About that same time, the Rock Island made an offer to the trustees for a similar block of 26 percent of the stock.

pute arose, and apparently still exists, with respect to the validity of such commitments.[4] Thereafter, the Minneapolis made a further offer of $133 a share, but on May 26, 1955, before that offer was accepted, the president of the Santa Fe, acting on behalf of that carrier alone, agreed to purchase all the stock held by the trustees for $135 per share, subject to our approval. Thereafter, separate agreements in like tenor were made with the remaining stockholders of Western.

Agreement between Santa Fe and Pennsylvania—By agreement dated June 28, 1955, the Santa Fe, subject to our approval, agreed to sell to the Pennsylvania Company, a wholly owned subsidiary of Pennsylvania, 50 per cent of the entire outstanding capital stock of Western at an average price of $135 a share. Such purchase is without prejudice to any claims, causes of action, or rights which Pennsylvania may have against the trustees with respect to the transaction of April 15, 1955, involving 23,400 shares of such stock; and in the event Pennslyvania acquires all or any of such shares, the obligation under the contract is to be reduced accordingly.

The parties to the agreement, each with the other, and not for the benefit of others not parties thereto, agree that they will exercise their stock ownership of Western to accomplish the following objectives:

1. Western will continue to be operated as a separate and independent carrier with responsible management located along its lines in order to preserve to shippers and communities the present direct access to its officials.

---

[4] Regardless of the outcome of the dispute, it is the intent and purpose of the Santa Fe and the Pennsylvania that each is to own exactly 50 percent of the capital stock of Western.

2. The properties of Western, including line and equipment, will be maintained and improved in keeping with the requirements of a railroad of its character and importance.

3. Western will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of Western.

4. All existing routes and channels of trade via Western will be maintained and kept open without discrimination between connecting lines of railroad.

5. The board of directors of Western shall consist of 11 members, of whom 1 shall be the president of the company, 2 shall be officers of Santa Fe, 2 shall be officers of the Pennsylvania Company, or Pennsylvania, or both, and the remaining 6 shall be prominent citizens not connected with any one of the parties to this agreement but selected by the parties thereto and the subject of mutual agreement between them.

Proposals before the Commission—Four alternatives have been proposed for the disposition of these proceedings on the basis of the public interest involved. They are:

1. Authorization of joint and equal control of Western by the Pennsylvania and the Santa Fe.

2. Authorization of sole control by the Minneapolis.

3. Authorization of either application subject to a condition requiring the inclusion, pursuant to the provisions of section 5(2)(d) of the act, of one or more of the railroad interveners expressing a desire for such inclusion.

4. Denial of both applications, or the dismissal of the Minneapolis application in Finance Docket No. 19086, for the reason that no transaction within the meaning of section 5(2) is presented for our determination.

These proceedings represent a new and more complicated phase in the administration of section 5, since it involves 2 applications for authority to control the same property, and petitions by 4 other carriers for inclusion in the transaction under varying circumstances. We must weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitioners seeking such inclusion but also the other applicant and nonparticipating railroads as well.

The burden of proof, therefore, has become most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction. As a practical matter we, in such a proceeding as this, must arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it. The applications and petitions for inclusion must be denied unless there are advantages in the public interest.

Santa Fe and Pennsylvania systems—These applicants are two of the largest rail carriers in the United States. Their lines converge at Chicago. The Santa Fe system extends from that point to the Pacific coast. It serves 12 States, ranks first in mileage operated, third in freight and total revenues, fourth in the number of employees, and fifth in freight volume. The Santa Fe is strong in two of the fastest growing sections of the country, namely, the southwest and California, and is favored with the long haul of diversified traffic. Except for 3 years during the 1930's, it paid dividends on its stock each and every year since 1901. During the first 9 months of 1955, as compared with the

similar period of 1954, the tonnage and freight revenues of the Santa Fe increased approximately 11 per cent, and its net income increased 22.4 per cent. About 64 per cent of its freight revenues was derived from the transportation of manufactured products originating on its lines.

Except for the New England States, system lines of the Pennsylvania and its subsidiaries blanket the east. As owner of the Wabash, such lines extend westwardly to Des Moines, Iowa, Omaha, Nebr., and Kansas City. Although the Pennsylvania controls the Wabash through ownership of practically all its capital stock, the latter is independently operated with its own management and operating departments.

Pennsylvania operates in 13 States and the District of Columbia. It ranks first among class I rail carriers in the matter of investment, freight traffic, total freight revenues, or by practically any standard used to indicate size and volume of business handled. It has paid a stock dividend each year since 1847. In 1954, the freight revenues of the Pennsylvania, together with its independently operated subsidiaries, amounted to 11.9 per cent of the freight revenues of all class I rail carriers, and 170.6 per cent of the freight revenues of the next largest aggregate combination, the New York Central system. During the first 9 months of 1955, as compared with the similar period of 1954, the Pennsylvania enjoyed substantial increases of 19 per cent in freight tonnage, 12 per cent in revenues, and 171.7 per cent in net income. A little more than one-half of its freight revenues is derived from the transportation of manufactured products originated on its lines. In this respect it is the largest originator of rail traffic in the country.

Minneapolis—The Minneapolis operates approximately 1,400 miles of railroad lines in 4 States, the principal

route extending from Minneapolis, Minn., through Oskaloosa, Iowa, to Peoria. It also operates lines between Minneapolis, through Winthrop, Minn., to Aberdeen and Leola, S. Dak.; from Winthrop, through Tara, Iowa to Des Moines and beyond; and from Albert Lea, Minn., through Corwith, Iowa, to Fort Dodge, Iowa. Its lines do not reach the important gateways of Chicago, St. Louis, or Kansas City. At Peoria, the Minneapolis maintains direct connections for the interchange of traffic with Western, the Peoria & Pekin Union Railway, the Rock Island, and the Peoria Terminal. A complete description of the Minneapolis is contained in *Associated Rys. Co. Acquisition and Securties*, 228 I. C. C. 277. It serves 57 communities in Minnesota and 17 cities and towns in South Dakota.

Since 1936, Minneapolis has spent more than $84 million out of operating revenues on physical rehabilitation of its property. This expenditure has made Minneapolis a modern and efficient operating plant providing exceptionally good service to the public. It is completely dieselized and owns well conditioned rolling stock in adequate supply to accommodate and handle, in a safe and expeditious manner, an increase of at least 25 per cent in the volume of tonnage now available to it.

Minneapolis is predominantly an east-west railroad, bypassing the congested Chicago area. It is largely dependent upon agriculture and related products, and has not proportionately benefited from the tremendous increase in manufacturers' and consumers' goods in recent years. In 1954, agriculture represented 41.2 per cent of the Minneapolis' originated tonnage, 25.9 per cent of its total tonnage, and 30.4 per cent of its total freight revenues. Products of animals, mines and forests, together with farm products, aggregated 80.6 per cent of its originated tonnage

and 52.4 per cent of its revenues. Without doubt, Minneapolis is a substantial railroad rendering good service to the shippers and communities on its lines. It constituted one of the bright spots in providing freight cars for the 1955 grain movement.

For the period 1936-55, the Minneapolis' average annual gross operating revenues were $15,845,000, and its current annual railway operating revenues approximate $20,000,000. For the first 9 months of 1955, as compared with the similar period of 1954, the freight tonnage and revenues of Minneapolis rose by only a few percentage points, and its net income increased 5.6 per cent. On the basis of investment, Minneapolis ranked sixtieth in size among the 127 class I railroads in the country in 1955. It ranks approximately the same with respect to other comparisons usually considered in determining the relative importance and size of railroads generally. It is now reasonably prosperous, with a financial and physical picture that has been steadily improving over the past few years. Minneapolis has paid dividends regularly since 1943. Its capitalization is not burdened with outstanding preferred stock, and the relatively small amount of unfunded long-term debt will not mature until 1967.

During the 4 years 1950-53, 67 per cent of Minneapolis' aggregate loaded tonnage consisted of traffic originated or terminated on, or local to its lines, and 33 per cent constituted overhead or bridge traffic. In the same period, the Minneapolis' interchange with Western at Peoria averaged 12,995 revenue carloads per year which constituted an average of 5.9 per cent of the Minneapolis' total revenue loads and accounted for 8.1 per cent of its total annual freight revenues. In 1954, approximately one-half of the Minneapolis-Western Peoria interchanged represented Min-

neapolis bridge traffic handled in conjunction with the Santa Fe to and from Nemo.

Nickel Plate and Rock Island—These two interveners are grouped together because their respective interests are identical. Each desires a proportionate share of the capital stock of Western irrespective of which pending application is approved; and in the event the applicant or applicants are unwilling to accept, as a condition to approval of their application, participation on an equal basis of ownership by the Nickel Plate and the Rock Island, the latter are ready and anxious to undertake the purchase of the stock for their own accounts. They believe that the true independence and neutrality of Western best can be assured and intended only if the stock-control transaction is thrown open to all interested connections desiring to participate.

Nickel Plate is the sixth largest railroad in size in eastern territory. It serves directly the gateways of Chicago, Peoria, and St. Louis. Nickel Plate is dependent upon the Western for access to western lines, particularly the Santa Fe, via the Peoria gateway, and Western is Nickel Plate's largest single connection at Peoria. Statistics of record indicate that the Western interchange represents 26 per cent of all the traffic handled in Nickel Plate trains to and from Peoria.

The Rock Island operates 7,895 miles of lines in 14 States, extending generally from Chicago, St. Louis, and Memphis, Tenn., on the east, to Tucumcari, N. Mex., and Denver, Colo., on the west. Its line to Peoria branches off the Chicago-Denver main line at Bureau. In 1954, Rock Island's operating revenues totaled more than $187,000,000, and it earned $28.84 per share of preferred stock and $10.96 per share of common stock.

Wabash and Burlington—As indicated heretofore, the Wabash and the Burlington have no objection to the granting of the application of the Santa Fe and the Pennsylvania, provided the usual conditions for the maintenance of joint rates and through routes are imposed. But, if any carrier other than the Santa Fe and the Pennsylvania is authorized to acquire control or an interest in Western, then the Burlington and the Wabash desire to participate in such control to the same extent.

Since 1859, Wabash has operated under trackage rights over Western's line between Elvaston and Hamilton. At the latter point these two carriers operate a jointly-owned track which connects the Western main line with the municipal bridge across the Mississippi River used by both to serve Keokuk. The Wabash also operates over the main line of Western between Forrest and Fairbury to get to and from its branch line serving Streator. The contractual relationships between Wabash and Western include provisions for the maintenance and operation of stations and interlocking facilities. The current contract contains a 1 year cancellation provision, and it is vitally important to the Wabash, and the shipping public served by its Streator branch, that control of Western will not be acquired by a carrier or carriers detrimental to the interests of the Wabash. Loss of the trackage rights now enjoyed by the Wabash over the Western would require consideration of the abandonment of both the Streator branch and the Keokuk branch north of Meredosia. In 1955, the Wabash interchanged a total of 3,438 carloads of revenue freight with Western at 5 different junction points, the most important of which, from the standpoint of volume, was Forrest.

Minneapolis' proposals—The Minneapolis is opposed to joint or multiple ownership of Western. It seeks to ac-

quire exclusive control in order to increase the operating efficiency of its plant, diversify its traffic base, establish new service routes, provide suitable land for the location of industries on its lines, enhance its financial stability, effect substantial economies through elimination of duplicate facilities, and render an improved transportation service to the public. The Minneapolis is willing to enter into agreements similar to those now existing between the stockholders of Western, on the one hand, and Santa Fe, on the other. In payment for such stock, the Minneapolis would issue $12,000,000 of first-mortgage sinking-fund bonds, bearing interest at the rate of approximately 4¼ per cent per annum, maturing 30 years from the date of issue, with equal annual sinking-fund payments of $480,000, commencing in the sixth year. The remaining $150,000 of the purchase price would be paid in cash from funds available in its treasury.

The proposal of Minneapolis unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works. Only the corporate existence of Western would remain. For all practical purposes Western would be integrated, consolidated and merged into the Minneapolis for ownership, management, and operation. Western's headquarters and general offices would be moved from the present location at Peoria to the City of Minneapolis, and all policies and directions for the operation of the joint properties would emanate from that point. An estimated 256 positions, most of them on Western, would be affected by the plan. Of the 24 executive positions on Western at the present time, only a trainmaster and a roadmaster would be retained for direct supervision of Western's trackage.

Only the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of Western as a separate and independent operating carrier. All the other parties to these proceedings, including the railroad interveners, the communities served by Western, and the shippers who appeared as witnesses, insist that the separate and independent operation of Western under its present local management is a public necessity. In fact, all the communities on the line of Western between Peoria and the western termini are fearful that under the Minneapolis' control the western portion of the line will be abandoned because of the competition that line furnishes the line owned by the Minneapolis between Peoria and Nemo. While at one time officials of the Minneapolis considered such an eventuality, the instant record conclusively demonstrates that abandonment of any portion of Western is not included in the present plans of the Minneapolis in seeking control. The latter is willing to accept a condition to that effect.

The Minneapolis contends that its acquisition of control of Western not only will give the Minneapolis direct interchange connections with the Nickel Plate, Illinois Terminal and Burlington at Peoria, but will also provide additional direct interchange points east of Peoria with the Pennsylvania at Effner, the Gulf at Chenoa, the Illinois Central at Gilman and El Paso, the Chicago & Eastern Illinois at Watseka, the New York Central at Sheldon, the Wabash at Forrest, the Nickel Plate at Farmdale, and the Chicago, Milwaukee, St. Paul & Pacific at Webster. Under unified operations, the Minneapolis proposes to establish coordinated schedules between it, the Western, and the connecting carriers, providing new service routes via these additional junctions for moving traffic in all directions.

The record shows that such a policy would be extremely harmful to other carriers. For example, of a total of 21,041 cars interchanged between the Wabash and the Minneapolis at Des Moines and Albia, Iowa, in 1955, 7,364 cars were destined to or from points in Illinois and points east thereof. Under the Minneapolis' unified-operation theory, a new service route via Forrest would be established for such traffic which would imperil, or at least diminish, the Wabash's participation therein, and possibly could result in the abandonment of the latter's Des Moines branch. Other intervening carrier connections similarly would be adversely affected by the Minneapolis' proposal. The Minneapolis contends that such carriers can be amply protected by appropriate conditions with respect to through routes and joint rates to be attached to the order approving its control of Western.

The Minneapolis further contends that Western is a natural extension of its railroad; that its interchange with Western at Peoria is proportionately greater in carloads and freight revenues than any other carrier interested in these proceedings; that no one can operate Western to greater advantage or more economically than the Minneapolis; and that its failure to acquire control of Western would materially curtail the expansion of Minneapolis' service and the full use and development of the Peoria gateway. Acquisition of control of Western would permit the Minneapolis to abandon its yard at Peoria and use the yard of Western, thereby eliminating a switching operation at that point and reducing interchanges to 1 yard instead of the 2 now required.

The Minneapolis estimates that economies totaling $1,770,945 can be achieved jointly by it and the Western

through elimination of duplicate facilities and traffic agencies, more efficient use of work forces, plant and power, and mechanical accounting. Most of the savings would be effected at the expense of Western's employees. The Minneapolis states that it will seek to minimize any adverse effect upon employees, because it has a number of workers on the payroll who are in the upper age brackets, and as these people are automatically retired, room will be made for the absorption of Western's employees to be released or displaced. The Minneapolis states that the economies which would result from its operation of Western would redound not only to the benefit of these two small carriers, but would also redound to the benefit of shippers and the public generally through improved service, thus encouraging the development of the combined territories served and the location of new industries along their lines.

Other benefits and advantages claimed by the Minneapolis in the matter of adequate car supply and the coordinated service which would result if Western were controlled by the Minneapolis are of record, but in view of our findings herein with respect to the disposition of its application, the details thereof need not be specifically described. The Minneapolis insists that it alone has no conflict of interest with Western, or the Peoria gateway, and no incentive other than to maximize the traffic and service that would be rendered over the combined lines. Conversely, it contends that all other carriers interested in the acquisition of all or a portion of the control of Western have their main lines, interests, and investments in direct competition with Western and the Peoria gateway. Hence, acquisition of Western by any other interested carriers would sharply decrease competition, not only in that it would be the acquisition of Western by its competitors, but also in that it would

materially decrease the ability of the Minneapolis to compete with such other carriers.

Competition and diversion of traffic—The Santa Fe and the Pennsylvania are complementary to each other insofar as they work through their connections with the Western. The Rock Island and the Santa Fe are in competition; the Nickel Plate competes with the Pennsylvania and Wabash; and Minneapolis is in competition with the Rock Island and other parties. All the carriers endeavoring to participate in its control are in competition with Western. Santa Fe's and Pennsylvania's routes via the Chicago gateway compete with Western's routes through the Peoria gateway. The Nickel Plate competes with the eastern half of Western, and the Rock Island competes with the western half. The Wabash, the Burlington, and the Minneapolis also compete with Western.

The important thing is not whether there is possibility of competition, but whether there is probability of existing or potential competition being diminished or strangled by the Western under the control of the Santa Fe and the Pennsylvania. Under such control, Western would have an increased opportunity to secure traffic now moving via other gateways. While the Santa Fe and the Pennsylvania ordinarily solicit traffic for their long hauls, they have not worked against Western, and have offered only passive resistance against Lomax and Effner, respectively, in recognition of the benefits they would receive from the Western route. Considering the greater expense of operating through a large congested terminal, Santa Fe and Pennsylvania are just about as well off financially when handling traffic via Western as they would be on the long haul through Chicago. If the Santa Fe obtains a half interest in Western, it

intends to place Lomax on a parity with Chicago from a solicitation standpoint, and as the other half owner, the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis. While the Pennsylvania will continue to solicit its long haul to St. Louis, Effner and Chicago will be on a parity. Of course, if service over the Western is improved under the control of the Santa Fe and the Pennsylvania, and traffic can be handled over it more economically and efficiently than over existing routes, there may be some diversion of traffic, but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers.

As for solicitation, the record shows that all but a very small part of the nation's traffic is routed by the shipper, and that many factors, the most important of which is service, influence such routing. Generally, the shipper gives the originating carrier a long haul, or at least a line haul, but junction points are seldom included in the routing. Shippers also desire to maintain friendly relations with as many railroads as possible and, for that reason, there is a tendency to divide the traffic among several railroads. Shippers like to favor small railroads with a part of their traffic, and will use the line of a particular carrier because of a friendly relationship with that railroad's solicitors. Normally, an industry feels a definite obligation to the originating carrier. The industry seeks rate and routing information from that line, places rate problems before it, looks to it for car supply, and relies upon it for tracings and diversions. These factors are operating today and are reflected in the present division of traffic among all of Western's connections, and since no change in service is contemplated

with Western under the control of the Santa Fe and the Pennsylvania, the volume of traffic handled by the protesting intervening carriers should not be materially affected. The self-interests of the Santa Fe and the Pennsylvania provide further assurance that Western's present solicitation and service policies will be continued. Those policies have been responsible for the success of Western in the past, and the best way for the Santa Fe and the Pennsylvania to insure a substantial return on their investments to be made herein is to see that the Western management is left free to continue them.

The Minneapolis contends that with Santa Fe and the Pennsylvania in control of Western $7,000,000 of its traffic would be vulnerable to diversion, of which it thought $1,100,000 was certain of loss. This last figure was obtained by dividing the traffic into 12 categories and applying a percentage to the gross revenue derived from each category. The record does not disclose the basis of the percentages used.

The Minneapolis estimates that 75 per cent of its traffic moving between Peoria and Nemo will be diverted to the Western by the combined influence of the Santa Fe and the Pennsylvania as originating and terminating carriers. It contends that this will be accentuated by the placing of Lomax on a parity with Chicago. We are of the opinion that the placing of Lomax and Chicago on the same level for the solicitation of traffic would have little effect on the Nemo-Peoria traffic of the Minneapolis. The Santa Fe has solicited that traffic for its long haul to or from Chicago. The Western has solicited it via Lomax, and all other carriers connecting with the Santa Fe west of Chicago have solicited it. Notwithstanding this intense competition, the Minneapolis has been able to handle the traffic.

It is evident that the Peoria-Nemo traffic secured by the Minneapolis is traffic which does not move on a competitive service basis. The record shows that the Minneapolis does not co-ordinate schedules with the Santa Fe at Nemo, nor has it been making its connections with the Western and the Nickel Plate at Peoria on eastbound traffic. In 1953, the Minneapolis canceled its guaranteed schedules on perishable traffic moving through Nemo in conjunction with the Nickel Plate at Peoria. The large volume of traffic presently moving via the Western route is evidence of the superior connecting service it provides.

Shippers desiring to favor the Santa Fe now route their traffic via the Santa Fe's long haul to Chicago. The diversion of this traffic to Lomax as a result of placing it on a parity with Chicago would have no effect on the Minneapolis, because the Minneapolis does not share in the haul on this traffic today. Shippers using the Santa Fe, who prefer the Peoria gateway for service reasons, presently route their traffic via the Western at Lomax because of the inferior service via Nemo. The only traffic moving via the Minneapolis is traffic on which shippers desire to give it a haul, and the Santa Fe's parity policy would not affect the continuation of such desires to favor the Minneapolis with a portion of their traffic. Consequently, there would be little or no effect upon the traffic now moving between Nemo and Peoria. On the other hand, the Pennsylvania's policy of placing Effner on a parity with Chicago would divert a portion of traffic now moving through Chicago to Effner and the Peoria gateway, thus giving the Minneapolis an opportunity to solicit the haul to and from its connection with the Western at Peoria.

The Minneapolis estimates that it would lose 50 per cent of the traffic moving through Peoria and the Kansas City

and Omaha gateways, which it now bridges between Peoria and junction points other than Nemo. It states that such traffic would be subject to diversion over the Pennsylvania-Western-Santa Fe route. The present routing of this traffic reflects the influence of the other western carriers which compete with the Santa Fe and which, to a large extent, are responsible for its movement. The fact that the other western carriers and the Minneapolis overcame the solicitation of the Santa Fe and the Western, which afford a more direct service route, indicates that other factors beyond the control of the Santa Fe influenced the routing of this traffic. Partial ownership of the Western will not alter the degree of the Santa Fe's solicitation influence and will not affect the basis on which this traffic presently moves. This business would not be lost so long as the Minneapolis and the connections handling it continue the same effective solicitation effort that is being exerted today, and the service via the Minneapolis through Peoria is not further impaired. The same solicitation situation exists with respect to the traffic originated and terminated by the Minneapolis at Peoria, a portion of which, it is claimed, would be diverted if the Santa Fe-Pennsylvania application were approved.

The Rock Island contends that its traffic vulnerable to diversion with Western under the control of the Santa Fe-Pennsylvania, primarily through the position of the Santa Fe, would amount to an estimated $2,984,309, more than $1,000,000 of which represented traffic originated or terminated at Rock Island points competitive with the Santa Fe and interchanged with the Western at Keokuk. The nature of this interchange traffic is such that the possibility of its diversion to the Santa Fe is remote, particularly in

view of the fact that much of it originated or terminated at industries served exclusively by the Rock Island.

Almost $1,500,000 of the alleged loss claimed by the Rock Island through diversion was derived from traffic which moved into and out of Peoria from and to Chicago and Joliet as competitive origins, destinations, or junctions. The small volume of traffic interchanged between the Western and the Santa Fe at Eureka, as reflected by data of record, indicates that the Santa Fe is not a factor in the movement of traffic between Chicago and Peoria via the Western. The Western's route from Peoria to Chicago is via main-line connections with the Wabash at Forrest, the Chicago & Eastern Illinois at Watseka, and the Illinois Central at Gilman. Thus, it appears unlikely that the Santa Fe's partial ownership of the Western could enhance its competitive position as to traffic for which the Santa Fe maintains no competitive route.

Neither will the Santa Fe's partial ownership of the Western affect the diversion of traffic moving via the Rock Island between Peoria and points competitive with the Santa Fe in the west. The lack of Santa Fe influence as to this traffic is evidenced by the fact that it has unsuccessfully solicited it. The Rock Island, with direct service at Peoria, enjoys the paramount influence as to this traffic, since it affords shippers at Peoria its services as an originating or terminating carrier. The Western is not afforded such influence, because it maintains direct service to very few industries at Peoria.

With Western under the control of the Santa Fe-Pennsylvania, the Nickel Plate estimates a loss of traffic amounting to approximately $2,200,000, consisting of traffic interchanged with the Santa Fe at Chicago, and with the

Western at Peoria. The Santa Fe contends that its policy of placing Lomax on a parity with Chicago will have no effect upon this traffic, because the Nickel Plate is able to solicit it both at Chicago and at Peoria. The divisions accruing to the Nickel Plate at Peoria exceed those at Chicago, and on transcontinental business are equal to those at St. Louis. Thus, it is argued by the Santa Fe that the placing of Lomax and Chicago on a parity will have the effect of increasing the revenues of the Nickel Plate.

The greatest portion of the Nickel Plate's interchange traffic with the Western is bridged via the Western to or from the Santa Fe at Lomax. In 1954, the Nickel Plate interchanged a total of 14,497 cars with Western, of which the Santa Fe participated in the movement of 11,221 cars. Most of the Nickel Plate's traffic bridged from Lomax via the Western is perishable moving, in superior service, to points on the Nickel Plate and its connections. It provides the Santa Fe with a long haul to Lomax on traffic which otherwise might move via St. Louis. If the Western's connection with the Nickel Plate were not maintained as a service route, this traffic would be routed to the Nickel Plate at St. Louis, short-hauling the Santa Fe at Kansas City. Thus, the self-interest of the Santa Fe would assure the continuance of good service to the Nickel Plate at Peoria and prevent preferential solicitation by the Western for the Pennsylvania at Effner. As stated above, the Western, being dependent upon the traffic of its connecting lines for successful operations, must continue its present policy of working closely with all its connections or lose the traffic it now interchanges with them. It is evident that such loss would be of no benefit to the Santa Fe-Pennsylvania as owners of the Western. We are convinced that the benefits to be derived from the operation of West-

ern under the control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the over-all national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers. *Compare McLean Trucking Co. v. U. S.*, 321 U. S. 67.

Passenger service—The Rock Island also has a major concern in that it has made commitments in passenger operations to and from Peoria, and has only recently inaugurated a new train between Peoria and Chicago. The Rock Island fears that with the Santa Fe in 50 per cent control of Western, its Peoria passenger business is in jeopardy, and, at the hearing, suggested that the Santa Fe and the Pennsylvania stipulate to a condition that no passenger service would be operated on the Western without application to us for approval. The record shows that the Santa Fe and the Pennsylvania do not contemplate providing passenger-train service on Western, and they have not held out any hopes for such service to the people in the area which it serves. Through passenger service via the Santa Fe and the Western could be established at any time without Santa Fe's control of Western. Passenger service is not an issue in this proceeding and the imposition of a condition such as that suggested by the Rock Island is not necessary.

Trackage rights—As stated heretofore, Monon Railroad requests trackage rights over the Pennsylvania if the latter is authorized to participate on an equal basis with Santa Fe in the control of Western. To the extent that the development of the Peoria route draws traffic from the Chicago gateway, Monon contends that it may lose some of the traffic it now handles through that gateway in common

with other carriers similarly situated. Monon further contends that a connection with the Western at Effner would make it possible for Monon to recover such traffic and place it on an equality with its more powerful competitors in the solicitation of business as between the Chicago and Peoria routes. At the hearing a witness for the Monon stated its position in the premises, but made no effort to describe with any particularity the traffic which might be lost, the carriers over whose lines it moves, its volume, or the areas of origin and destination.

Ordinarily we are without authority to compel one railroad to grant trackage rights over its line to another carrier. See *Baltimore & O. R. Co. Operation*, 261 I. C. C. 535, and *Alabama, T. & N. R. Corp. Construction*, 124 I. C. C. 114. We are of the opinion that the potential loss of traffic by the Monon via the Chicago gateway as a result of our approval of the Santa Fe-Pennsylvania application is too nebulous to warrant the imposition of a condition granting that carrier trackage rights extending its operations for approximately 35 miles into new territory without proof of public convenience and necessity. Accordingly, the request for such a condition is denied.

Prescribed conditions—The Santa Fe and the Pennsylvania are committed to the maintenance of all existing routes and channels of trade via Western without discrimination. Their announced policy toward Western's other connections is expressed in specific conditions which they have agreed to accept as a part of any order approving their application. Those conditions are as follows:

1. That under the control of Santa Fe and Pennsylvania, Western shall maintain and keep open all routes

and channels of trade via existing junctions and gateways, unless and until otherwise authorized by us;

2. The present neutrality of handling traffic inbound and outbound and in overhead service by Western shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier without discrimination as to routing or movement of traffic, and without discrimination in the arrangements of schedules or otherwise;

3. The present traffic and operating relationships existing between Western, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of the Santa Fe or the Pennsylvania;

4. Western shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement;

5. Santa Fe and/or Pennsylvania shall not do anything to restrain or curtail the right of industries located on Western to route traffic over any or all existing routes and gateways;

6. Santa Fe and Pennsylvania shall refrain from closing any existing route or channel of trade with any carrier party to this proceeding on account of their control of Western, unless and until otherwise authorized by us; and

7. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any

of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

The foregoing conditions are broad enough to protect the interests of all lines connecting with Western, and are similar to the conditions imposed in *Detroit, T. & I. R. Co. Control, supra, Savannah & A. Ry. Co. Control,* 282 I. C. C. 39, and *Pacific Coast R. R. Co. Control,* 282 I. C. C. 600, in each of which the same arguments against the effectiveness of such conditions were advanced. The foregoing conditions will be included, by reference, in our order granting the authority herein sought by the Santa Fe and the Pennsylvania.

Purchase price—The Minneapolis contends that the purchase price of $135 per share offered by Santa Fe is neither just nor reasonable, because the consideration for a portion of that amount is in settlement of the dispute pending between the trustees and the Santa Fe as an outgrowth of the validity of the April 15, 1955, letter in which the trustees agreed to dispose of 26 per cent of the stock of Western each to the Santa Fe and the Pennsylvania. The Minneapolis states that its offer to purchase Western's stock at $135 a share is just and reasonable in view of the substantial economies, increased efficiency, improved service, and other benefits which would flow from Minneapolis' control of Western. The stock of Western, being closely held, is not listed on any exchange, but its market value was established on the basis of agreement between a willing seller and a willing buyer. The price proposed to be paid by the Santa Fe and the Pennsylvania is the same as that offered by the railroads requesting inclusion. The reason-

ableness of the purchase price is also indicated by the excellent physical and financial condition of Western, its good earnings and operating record, the value of its properties as fixed by us for rate-making purposes, its progressive and able management, and its strategic location which adds to its value as a long-term investment. If $135 per share is the proper price for the Minneapolis to pay, it is fair and reasonable as to the Santa Fe and the Pennsylvania.

State representations—The States of Minnesota and South Dakota, along with their respective Public Service Commissions, intervened in support of the Minneapolis application. They fear that with Western under the control of the Santa Fe and the Pennsylvania, the Peoria route of the Minneapolis will deteriorate to the extent that its low density lines in Minnesota and South Dakota will be in danger of abandonment. On the other hand, the State of Illinois opposes the application of the Minneapolis because of the possibility that the portion of Western's line west of Peoria may be abandoned, and the further reason that such control would have a devastating effect upon the economy of the city of Peoria and the State of Illinois generally. Of course, there can be no abandonment of any line of railroad without the issuance by us of a certificate of public convenience and necessity permitting such abandonment. So far as the instant record is concerned, no abandonments are presently contemplated.

Wabash control case—In *Wabash R. Co. Control*, 247 I. C. C. 365 and 252 I. C. C. 319, the Pennsylvania and the Pennsylvania Company were authorized to acquire control of the Wabash through ownership of its capital stock subject to conditions, among others, that the Penn-

sylvania maintain, or cause to be maintained, joint rates, joint routes, interchange points, and channels of trade through gateways of the Wabash then existing, until and unless otherwise authorized by us.

Both the Minneapolis and the Nickel Plate contend that, since the Wabash now has a substantial interchange with the Pennsylvania at Logansport, Ind., and that route will not be placed on a parity with Western's route via Effner, Pennsylvania's proposal to favor Western over Wabash will effectively alter the joint rates and joint routes in contravention of the conditions under which the Pennsylvania was permitted to acquire control of the Wabash. They state that the *Wabash Control case* must be reopened and reexamined to determine whether the joint control of Western by the Pennsylvania would be consistent with the public interest and the interest of the Wabash.

The Wabash has not raised the issue. With the imposition of the usual conditions as to the maintenance of existing through routes and channels of trade it supports the Santa Fe-Pennsylvania application. We are unable to find that the granting of that application with the conditions previously stated attached, will lead to violation of the conditions imposed in the *Wabash Control case* or prejudice their effectiveness. While the plan to place Effner on a parity with Chicago, as previously mentioned, will increase the flow of traffic through Effner, such increase will consist of traffic now moving via Pennsylvania through Chicago in which the Wabash does not at present participate. Furthermore, the Pennsylvania in the past has favored Western's route through Effner rather than the Wabash route through Logansport and there will be no change in this policy.

Clayton Act antitrust violation—The Minneapolis contends that approval of the Santa Fe-Pennsylvania application for authority to acquire control of Western would be in violation of section 10 of the Clayton Act because of the existence of interlocking directors between the Pennsylvania and its subsidiaries, on the one hand, and the Wilmington Trust, a trustee of the McNear estate, on the other. Section 5(11) of the act provides that "the authority conferred by this section shall be exclusive and plenary" and we have on several occasions pointed out that approval of a transaction consistent with the public interest under section 5 renders inoperative any prohibition of Federal, State, or municipal legislation, including the Clayton Act. Furthermore, the issue before us does not involve a purchase by the Pennsylvania from the Wilmington Trust. The Santa Fe is the only purchaser of the stock from the trustees and had no commitments to sell any of it to any other railroad. Before offering to sell a portion of the stock to Pennsylvania several other joint control possibilities were considered and rejected. Under the circumstances, the contention of the Minneapolis in this respect is untenable.

Employees—Counsel for railway labor organizations exacted commitments from all carriers involved herein to abide by the provisions of the Washington Job Protection Agreement of 1936, and our order herein will be conditioned upon compliance with such provisions. The employees unanimously favor the granting of the Santa Fe-Pennsylvania application.

Conclusion—We cannot decide these cases to the satisfaction of all participants. Our duty is to determine the pending matters on the basis of what is consistent with the public interest. It is universally conceded on the record

that Western now is a well managed, independently operated railroad furnishing a valuable rail transportation service to the public. Most of the interested parties, including all the shipping witnesses, municipal authorities, and commercial associations testifying on the subject, favored the continuation of Western in its present status, but the stockholders desire to sell, and without doubt they have that right, so the only question for determination is whether the sale of the stock to the carrier selected by them and the distribution to be made of it thereafter are consistent with the public interest. We have recognized that it is in the public interest for control of a carrier to pass from noncarrier interests, which no longer desire it, to carrier auspices. *Savannah & A. Ry. Co.-Control, supra,* and the cases therein cited.

The Santa Fe and the Pennsylvania assert that they are the logical carriers to acquire control of Western, because they are its principal connections. Situated as it is between the Santa Fe at Lomax on the west and the Pennsylvania at Effner on the east, Western receives its long haul and provides a vital direct link essential to the type of through service which is becoming increasingly important not only to the shipping public but to the railroads as well. Fast, strong, and reliable through transportation service is necessary in order for the railroads adequately to compete with the other modes of modern transportation, and Western, as a direct east-west line, supplies the short-line connection for providing this through service with a minimum of delay.

Public interest demands that the present policies of Western in all respects be continued. Any reduction in the ownership interests of the Santa Fe and the Pennsylvania by the inclusion of other carriers in the control of Western

would be accompanied by an equivalent reduction in their economic incentive for the future development of Western and the territory served by it. The case of *Illinois-Missouri Terminal Railway Company et al. Purchase, Etc.*, Finance Docket No. 18752, 295 I. C. C. —, (not printed in full), decided April 2, 1956, relied upon so heavily by the carriers seeking to be included in these proceedings, is distinguishable in that the invitation to participate in the control of the Illinois-Missouri was extended to each and every railroad connecting with that carrier, and all the participants were in agreement as to the manner by which ownership was to be effected and operations were to be conducted. Such universal agreement is not present in the instant applications. No greater protection could be afforded to carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carrier in the east and the largest one in the west. Under this built-in system of checks and balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones. The contract of June 28, 1955, between the Santa Fe and the Pennsylvania pertaining to the objectives to be accomplished under their joint control, together with the conditions imposed with respect to the maintenance of all existing routes and channels of trade of Western without discrimination, is adequate to protect the latter's other connections. Only 3 of Western's 16 rail connections oppose the joint control of the Santa Fe and the Pennsylvania.

With the backing of the Santa Fe and the Pennsylvania, there are excellent prospects for locating new industries on Western which will substantially increase the traffic originating and terminating on its line. Western has large acre-

ages of potential industrial property in the Peoria area, and at other points along its line, and with the combined efforts of the industrial development departments of the Santa Fe and the Pennsylvania, such property development may be expected without undue delay.

Several nationally prominent traffic executives of large industrial concerns, which annually route a substantial volume of traffic via Western, testified in support of Santa Fe and Pennsylvania joint ownership. They based their support upon the fact that the Santa Fe and the Pennsylvania are presently rendering excellent service in conjunction with Western and that ownership by them would constitute their best assurance of continued good service via the combined Santa Fe-Western-Pennsylvania route, as well as via each of the other connections of Western.

Virtually every one of the shippers and community witnesses along the line stressed the importance of maintaining Western as a separate and independent carrier. They are anxious that Western's present management be retained and favored the plan for local representation on the board of directors. They stressed the desirability of maintaining the existing plant and facilities in the Peoria area, and the desirability of retaining Western's headquarters at Peoria in order to continue the present easy access to management which is of inestimable value to shippers. Each of the city officials and representatives of chambers of commerce of the communities served by Western recognized the advantage of Santa Fe-Pennsylvania ownership as an economic stimulus to the industrial development of their communities. They were joined by business interests which recognized that such industrial development would result in expanding markets.

The Santa Fe and the Pennsylvania representatives on the board of Western will advise and assist Western on matters involving the technique of railroad management and the realization of economies in operation. Western also can expect to realize advantages in connection with its purchases, if it is controlled by two roads which purchase in such large volume as the Santa Fe and the Pennsylvania.

Under joint control by the Santa Fe and the Pennsylvania the supply of freight cars available to Western would be materially increased. The Santa Fe and the Pennsylvania would see to it that the car ownership obligations of Western were met in full, either by having Western increase its car ownership or by increasing their own ownership sufficiently to take care of Western.

Disposition of the applications—We have before us two applications requesting authority to acquire control of the same carrier. The first filed in point of time reflects a transaction capable of being consummated upon our approval. The second would require further steps before the plan could be consummated. Under no circumstances could it be consummated unless the first is denied. The Minneapolis has no enforceable contract for the purchase of Western's stock and there is no guarantee that, if the application of the Santa Fe and the Pennsylvania is denied, the trustees automatically would turn to the Minneapolis as the only remaining prospective purchaser. Furthermore, even if the Minneapolis could prevail upon the trustees to sell their interest in Western, there still would remain a substantial minority of stock in the hands of other holders which the Minneapolis has no assurance that it could acquire. On the present record, it would not be in the public interest to have a minority block of Western stock outstanding in the hands of others.

The Minneapolis relies upon our decisions in *Beaver, M. & E. R. Co. Control*, 158 I. C. C. 219 and 170 I. C. C. 556, as authority for entertaining its application herein. That case involved an application by the Rock Island to acquire control of the Beaver, Meade, & Englewood Railroad Company through the purchase of capital stock and certain other securities. The Missouri-Kansas-Texas Railroad Company intervened in opposition to the Rock Island application and subsequently filed its own application for the same authority. The intervener had no contract with the stockholders or the owners of the securities, both stock and securities being involved in the sale, but offered to pay the same cash price therefor as offered by the Rock Island. After a joint hearing, as here, we authorized, as in the public interest, the Missouri-Kansas-Texas to acquire the control requested. In determining consistency with the public interest and the national transportation policy we are not shackled in a case like this by the first application filed, if there is presented for our consideration at the same time a different proposal which but for the situation created by the first application might easily be accomplished. The public interest is the prime consideration, and in making that determination we must have regard for all relevant factors.

Consistent with the foregoing, we have carefully considered the evidence and arguments presented relating to both the applications before us and conclude upon the basis of the whole record, and as reflected by this report, that the application of the Santa Fe and the Pennsylvania should be granted subject to the conditions previously alluded to herein. With our approval of that application, the possibility of the Minneapolis acquiring the Western's

stock is eliminated and its application becomes moot. Accordingly, the application of the Minneapolis will be dismissed.

We also have considered the request of certain connecting carriers that they be included in the transaction on an equal basis with the successful applicant or applicants and conclude that this would not be in the public interest. Such requests will be denied.

The transaction proposed by the Santa Fe and the Pennsylvania does not contemplate a guaranty or assumption of the payment of dividends or fixed charges, and there will be no increase in total fixed charges.

Findings—We find, subject to the conditions for the protection of railway employees and the maintenance of existing routes and channels of trade referred to herein, that acquisition by The Atchison, Topeka and Santa Fe Railway Company and the Pennsylvania Company, and through the latter by The Pennsylvania Railroad Company; of control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock, in equal amounts, as described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed are just and reasonable; and that the transaction will be consistent with the public interest.

We further find that the application of The Minneapolis & St. Louis Railway Company for authority to acquire control of the Toledo, Peoria & Western Railroad Company, through ownership of capital stock, should be dismissed.

An appropriate order will be entered effective 35 days from the date of service hereof.

Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 31st day of May, A. D. 1957.

Finance Docket No. 18991
Toledo, Peoria & Western Railroad Company Control

Finance Docket No. 19086
Toledo, Peoria & Western Railroad Company Control

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions for the protection of railway employees and the maintenance of existing routes and channels of trade referred to in said report, acquisition by The Atchison, Topeka and Santa Fe Railway Company and the Pennsylvania Company, and through the latter by The Pennsylvania Railroad Company, of control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock, in equal amounts, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized;

It is further ordered, That the request of the Chicago, Rock Island and Pacific Railroad Company and The New York, Chicago and St. Louis Railroad Company, under section 5(2)(d) of the act, for authority to be included on an equal basis in the acquisition of control, through stock

ownership, of the Toledo, Peoria & Western Railroad Company be, and it is hereby, denied;

It is further ordered, That the application of The Minneapolis & St. Louis Railway Company for authority to acquire control of the Toledo, Peoria & Western Railroad Company, through ownership of capital stock, be, and it is hereby, dismissed;

And it is further ordered, That this order shall take effect and be in force 35 days from the date of service hereof.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 30th day of October, A. D. 1957.

Finance Docket No. 18991
Toledo, Peoria & Western Railroad Company Control

Finance Docket No. 19086
Toledo, Peoria & Western Railroad Company Control

It appearing, That by report and order in the above-entitled proceedings, dated May 31, 1957, the Commission, by division 4, authorized, subject to certain protective conditions, The Atchison, Topeka and Santa Fe Railway Company and The Pennsylvania Company, and through the latter The Pennsylvania Railroad Company to acquire control of the Toledo, Peoria & Western Railroad Company

through ownership of capital stock, dismissed the application of the Minneapolis & St. Louis Railway Company for authority to acquire control of the Toledo, Peoria & Western Railroad Company through ownership of capital stock, and denied the request of the Chicago, Rock Island and Pacific Railroad Company and the New York, Chicago and St. Louis Railroad Company for authority to be included on an equal basis in the acquisition by the Atchison, Topeka and Santa Fe Railway Company and The Pennsylvania Company and through the latter The Pennsylvania Railroad Company of control of the Toledo, Peoria & Western Railroad Company;

It further appearing, That on and after July 24, 1957, the Minneapolis & St. Louis Railway Company, the State of South Dakota, the Chicago, Rock Island and Pacific Railroad Company, and the New York, Chicago and St. Louis Railroad Company filed petitions for reargument and reconsideration of said report and order;

It further appearing, That upon the filing of said petitions and pursuant to section 17(8) of the Interstate Commerce Act the aforesaid order was stayed pending disposition of the matter;

It further appearing, That on August 20 and 21, 1957, The Atchison, Topeka and Santa Fe Railway Company and The Pennsylvania Railroad Company, certain chambers of commerce and communities, and certain municipalities and shippers along the lines of the Toledo, Peoria & Western Railroad Company, the City of East Peoria, and the City of Peoria, filed replies to the aforesaid petitions;

It further appearing, That on and after August 19, 1957, the Chicago, Rock Island and Pacific Railroad Company and the New York, Chicago & St. Louis Railroad Com-

pany, the Railway Labor Executives' Association, and the State of Illinois filed replies to the aforesaid petition of the Minneapolis & St. Louis Railway Company;

It further appearing, That on September 23, 1957, the State of Minnesota and Minnesota Railroad and Warehouse Commission filed a petition for leave to file a petition for reconsideration and concurrently therewith submitted to the Commission a petition for reconsideration;

And it further appearing, Upon consideration of the record herein, and the contentions set forth in said petitions for reargument and reconsideration (including the petition of the State of Minnesota and Minnesota Railroad and Warehouse Commission) and replies thereto, that there has been presented no error of fact or law with respect to the matters complained of by the petitioners, and that no showing has been made warranting reconsideration or further hearing;

It is ordered, That the petition filed by the State of Minnesota and Minnesota Railroad and Warehouse Commission for leave to file a petition for reconsideration be, and it is hereby granted; and that said petition for reconsideration submitted by the State of Minnesota and Minnesota Railroad and Warehouse Commission be, and it is hereby, accepted for filing;

It is further ordered, That the petitions for reargument and reconsideration be, and they are hereby, denied;

And it is further ordered, That said order dated May 31, 1957, be, and it is hereby, made effective 30 days from the date of service of this order.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

Section 1 of the Sherman Act, as amended (15 U.S.C. § 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on con-

viction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 7 of the Clayton Act, as amended (15 U.S.C. § 18):

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole of any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the forma-

tion of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 10 of the Clayton Act, as amended (15 U.S.C. § 20):

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

National Transportation Policy (49 U.S.C. preceding § 1):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial

regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5(2) of the Interstate Commerce Act, as amended (49 U.S.C. § 5(2))

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to

acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order appr ving

and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order, unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(11) of the Interstate Commerce Act, as amended (49 U.S.C. § 5(11)):

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority, and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this

section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.